Supreme Court, U.S.
FILED

001378 MAR - 1 2001

OFFICE

No.

IN THE

Supreme Court of the United States

HUGH STEWART, KAMERON HYDE AND SHERRY HORN,
Petitioners,

v.

THE BIRMINGHAM NEWS COMPANY,
Respondent.

On Petition For Writ Of Certiorari
To The Alabama Supreme Court

PETITION FOR WRIT OF CERTIORARI

LEAH O. TAYLOR
Counsel of Record

RHONDA PITTS CHAMBERS
TAYLOR & TAYLOR
2130 HIGHLAND AVENUE
BIRMINGHAM, ALABAMA 35205
PHONE: (205) 558-2800
COUNSEL FOR PETITIONERS

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

QUESTIONS PRESENTED

Whether the standard to be applied in determining the reach of the Federal Arbitration Act is the "substantial effect on interstate commerce" standard enunciated by this Court in *United States v. Lopez* and reaffirmed in *United States v. Morrison?*

If so, whether the performance of a contract between a local newspaper and local independent distributors providing for the intrastate local delivery of newspapers has the requisite substantiality of effect on interstate commerce so as to justify application of the Federal Arbitration Act?

PARTIES TO THE PROCEEDING

All parties to the proceedings in the Alabama Supreme Court are reflected in the caption of the case.

RULE 29.1 LISTING

Petitioners, plaintiffs below, are Hugh Stewart, Kameron Hyde and Sherry Horn. They are individuals, having no parent corporations nor any nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.1 LISTING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	
A. Distribution of the News	3
B. The Agreement	3
C. Intrastate Contacts	5
D. The Lawsuits	6
E. The Alabama Supreme Court's Decisions	7
REASONS FOR GRANTING THE WRIT	
I. The Alabama Supreme Court's Decisions Resolved a Federal Question in a Manner that Conflicts with Decisions of this Court.	11
A. The Economic Activity of the Local Delivery of Newspapers Does Not Substantially Affect Interstate Commerce.	15

B. Any Link Between the Local Delivery of Newspapers and Interstate Commerce Is Too Attenuated a Connection to Interstate Commerce 20

II. The Decisions of the Alabama Supreme Court Is Erroneous as a Matter of Statutory Interpretation and Constitutional Law..... 22

III. The Questions Presented Are Important. .. 25

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Ex parte Alexander, 558 So. 2d 364 (Ala. 1990) 7

A. G. Edwards & Sons, Inc. v. Clark, 558 So. 2d 358 (Ala. 1990) 7

Allied-Bruce Terminix Cos. v. Dodson, 513 U.S. 265 (1995) 11, 14

Evening News Publ'g Co. v. Allied Newspaper Carriers of New Jersey, 263 F.2d 715 (3d Cir. 1959), *cert. denied,* 360 U.S. 929 (1959) 9, 22

FERC v. Mississippi, 456 U.S. 742 (1982) 21

Gulf Coil Corp. v. Copp Paving Co.. 419 U.S. 186 (1974) 21

Heart of Atlanta Motel v. United States, 379 U.S.241 (1964) 17

Hurst v. Tony Moore Imports, Inc., 699 So. 2d 1249 (Ala. 1997) 19

Jack Ingram Motors, Inc. v. Ward, 768 So. 2d 362 (Ala. 1999) 7

Jones v. United States, 529 U.S. 848, 120 S.Ct. 1904 (2000) 16

Katzenbach v. McClung, 379 U.S. 294 (1964) ... 17

Lorain Journal Co. v. United States, 342 U.S. 143 (1951) 9

Maryland v. Wirtz, 392 U.S. 183 (1968) 21

Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983) 14

National Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 27

Page v. Work, 290 F.2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961) 22

Rogers Foundation Repair, Inc. v. Powell, 748 So.2d 869 (Ala. 1999) 19

Schroepfer v. A.S. Abell Co., 138 F.2d 111 (4th Cir. 1943), *cert. denied*, 321 U.S. 763 (1944) 23, 24

Sisters of the Visitation v. Cochran Plastering Co., Inc., No. 1981513, 2000 WL 264243 (Ala. March 10, 2000) 8, 10, 18, 19, 27

Solid Waste Agency v. Corps. of Engineers, __ U.S. __ 121 S. Ct. 675 (2001) 19

Southern United Fire Ins. Co. v. Knight, 736 So. 2d 582 (Ala. 1999) 19

Southland v. Keating, 465 U.S. 1 (1984) 11, 14, 15

United States v. American Building Maintenance Indus., 422 U.S. 271 (1975) 8

United States v. Lopez. 514 U.S. 549 (1995) ..... passim

United States v. Morrison, 529 U.S. 598, 120 S.Ct. 1740 (2000) ..... passim

United States v. Wall, 92 F.3d 1444 (6th Cir. 1996), *cert. denied*, 519 U.S. 1059 (1997) 18

Wickard v. Filburn, 317 U.S. 111 (1942) 8, 9, 16, 17

Constitutional Provisions and Statutes

U.S. CONST. art. 1, § 8 ..... 2, 11

9 U.S.C. § 1 2

9 U.S.C. § 2 2

18 U.S.C. § 922(q) 12

28 U.S.C. § 1257(a) 2

42 U.S.C. § 13981 13

Miscellaneous

Jeffrey Ghannam, *Serving Up Civil Rights*, 87 A.B.A. J. 44 (2001) 17

F. M. Haston, III, *Arbitration in Alabama - Of Road Signs and Reality*, 62 Ala. Law. 62 (2001) 25

Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, The Wash. Post, March 1, 2000 25

Thomas J. Methvin, *Alabama - The Arbitration State*, 62 Ala. Law, 48 (2001) 25

David G. Wirtes, Jr., *Suggestions for Defeating Arbitration*, 24 Am.J. Trial Advoc. 111 (2000) 25

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2000

Hugh Stewart, Kameron Hyde and Sherry Horn,
Petitioners,

v.

The Birmingham News Company, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

Hugh Stewart, Kameron Hyde and Sherry Horn respectfully petition for a writ of certiorari to review the judgments of the Alabama Supreme Court in this case.

OPINIONS BELOW

The opinions of the Alabama Supreme Court (App. A1-A18, A31-A32) are not yet reported. The opinions of the Circuit Court of Jefferson County, Alabama (App. A26-29, A30, A33-A36) are unreported.

JURISDICTION

The Alabama Supreme Court entered its judgment in the *Stewart* and *Hyde* cases on September 22, 2000. (App. A18). The Alabama Appellate Court denied a timely application for rehearing on December 1, 2000. (App. A19). The Alabama Supreme Court entered its

judgment in the *Horn* case on November 3, 2000. (App. A31). The court denied a timely application for rehearing on February 23, 2001. (App. A37). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause provides that "Congress shall have power ... [t]o regulate Commerce with foreign nations and among the several States." U.S. CONST. art. I, § 8.

Relevant portions of the Federal Arbitration Act ("the FAA"), 9 U.S.C. § 1, *et seq.*, are reproduced in the Appendix, infra, App. A31-32.

STATEMENT OF THE CASE

The dispute in these cases arises out of the termination of independent dealer contracts for the local distribution of newspapers. Respondent, The Birmingham News Company ("The News"), is an Alabama corporation engaged in the business of publishing certain newspapers, including *The Birmingham News ("The News")*. Petitioners, who are residents of the State of Alabama, are independent dealers authorized to act as the exclusive distributors of *The News* in specific geographic districts in Birmingham, Alabama. The contracts between the parties require the petitioners to purchase newspapers from The News and then resell the newspapers to customers within the specific geographic district. At issue is whether the performance of the contract between petitioners and The News has the requisite substantiality of effect on interstate commerce so as to justify application of the Federal Arbitration Act.

A. Distribution of the News

As part of its role as publisher, The News purchases paper, ink, news content, advertisements, supplies and product samples from various companies located outside the State of Alabama. The publishing process, which involves transforming these raw materials into newspapers, takes place at The News's principal place of business in Alabama. The newspaper is then distributed to customers through a mixed distribution system consisting of independent dealers such as Hugh Stewart, Kameron Hyde and Sherry Horn and employees or agents of The News.

Independent dealers are authorized to act as the exclusive distributors of *The News* only within specific geographic districts in Birmingham, Alabama. These dealers purchase newspapers from The News and then resell the newspapers to customers within the specific geographic district. This system has been in place for many years, and dealerships have attained substantial value. The News permits dealers to sell their exclusive dealerships pursuant to the conditions set forth in an Independent News Dealer Agreement.

B. The Agreement

Petitioners purchased for valuable consideration The News local delivery and rack distributorships for certain districts in Birmingham, Alabama, from other independent distributors. Thereafter, each petitioner executed an Independent News Dealer Agreement with

The News (the "Agreement").[1] The Agreement had a term of one year, and The News and petitioners executed additional Agreements thereafter. The Agreements were executed in Birmingham, Alabama.

The Agreement required petitioners to purchase from The News a sufficient number of newspapers and to distribute these newspapers for local delivery to customers. The Agreement provided:

> Newspaper agrees to sell, and News Dealer agrees to buy a sufficient number of copies of said newspaper to supply all customers at news-stands, stores, newsracks or other places where newspapers may be sold, and all subscribers to single copy home delivery of newspapers published by Newspaper, and newspapers for which Newspaper is the agent for distribution ... within the zip code including the area for which News Dealer is primarily responsible.

The Agreement details the independent nature of the relationship between petitioners and The News. Petitioners were given the full and exclusive right to deter-

---

[1] With the exception of the dates of their execution and expiration, the Agreements signed by petitioners are identical. Kameron Hyde purchased his distributorship in 1994; Hugh Stewart purchased his distributorship in 1988; and Sherry Horn purchased her distributorship in 1993. The preamble to Kameron Hyde's Agreement provides:

> THIS AGREEMENT made and entered into on the 31st day of October, 1997, by and between THE BIRMINGHAM NEWS COMPANY, a corporation duly created and existing under the laws of the State of Alabama and having its principal place of business at 2200 Fourth Avenue North, Birmingham, Alabama ..., and Kameron Hyde ..., doing business at Hoover/Lorna Road, Alabama.

mine the mode and manner in which newspaper deliveries to customers were to be made. The Agreement further provided:

> News Dealer shall make regular and prompt deliverys [sic] on the date of publication of complete newspapers intact, including preprints, supplements, and inserts designated by Newspaper only, to his subscribers and customers in a manner satisfactory to them (e.g. in a dry and readable condition). News Dealer shall pick up all newspapers from Newspaper in bulk at the agreed pickup point(s) .... News Dealer shall determine the manner in which he/she will reach the addresses of the subscribers and transport the newspaper....

C. Intrastate Contacts

Petitioners performed all of their duties relative to the Agreement in Alabama. Petitioners purchased and accepted delivery of assembled newspapers from The News at its principal place of business in Alabama. Petitioners hired local carriers to help deliver the newspapers. They then supervised and/or participated in the delivery of these newspapers to their customers, utilizing their own automobiles to transport the newspapers. They neither sold newspapers outside the state nor did they collect monies from customers living outside the state. Petitioners never purchased supplies from any company outside the State of Alabama. They purchased polyethylene bags and rubber bands for packaging the assembled newspapers directly from The News.

In 1997, The News made changes to its distribution system that adversely affected petitioners' abilities to function properly under the Agreement. One of the changes was to its customer-rating procedures. The

change caused dealers to be held responsible for complaints about service problems over which they had no control. In September of 1998, The News unilaterally terminated its relationship with petitioners by failing to renew their Agreements.[2] The News then hired individuals to distribute newspapers in petitioners' exclusive geographic districts. The News no longer has independent dealers involved in the distribution of newspapers in petitioners' former districts.

D. The Lawsuits

On July 30, 1999, petitioners filed complaints against The News in the Circuit Court of Jefferson County, Alabama. *Hugh Stewart v. The Birmingham News Company*, CV-99- 4313; *Kameron Hyde v. The Birmingham News Company*, CV-99-4314; *Sherry Horn v. The Birmingham News Company*, CV-99-4323. Petitioners' complaints asserted various state-law contract and tort claims. Petitioners contended that they purchased their distributorships in reliance upon representations made by The News that the Agreement between the parties would be maintained as long as petitioners performed their duties satisfactorily. Petitioners further contended that The News engaged in a scheme designed to eliminate local dealers who were independent of The News, to appropriate the fair market value of the dealers' business without compensation, to provide The News with a monopoly in the retail and publishing market and to increase its own profitability.

The News moved to stay the proceedings and to compel arbitration pursuant to an arbitration provision in the Agreement. The arbitration provision provided

[2] The News terminated Stewart's Agreement and failed to renew Horn's and Hyde's Agreements.

that "all claims and controversies arising out of this contract shall be submitted to arbitration for determination." In the *Hyde* and *Stewart* cases, the circuit court granted the motions to compel arbitration and stayed the proceedings pending arbitration. The circuit court found that one of the expressed purposes for distributing newspapers was to provide a means for advertisers to solicit customers. As a result, the court concluded that the Agreement had the requisite effect on interstate commerce to justify application of the FAA. In the *Horn* case, the circuit court denied the motion to compel arbitration. The circuit court recognized that there was a flow of commerce from sources outside Alabama to The News, but nonetheless concluded that petitioners had sufficiently established that the flow of commerce did not extend to the Dealer Agreements between the parties.

On December 2, 1999, Stewart and Hyde sought a writ of mandamus from the Alabama Supreme Court directing the trial court to vacate its order compelling arbitration of their claims against The News. On January 4, 2000, The News filed a notice of appeal to the Alabama Supreme Court in the *Horn* case.[3]

E. The Alabama Supreme Court's Decisions

Petitioners contended that nothing in the Dealer Agreement indicated that the transaction at issue involved interstate commerce within the meaning of the

---

[3] Pursuant to Alabama law in effect at the time, a ruling granting a motion to compel arbitration was reviewable by mandamus. *Ex parte Alexander*, 558 So. 2d 364 (Ala. 1990). *But see Jack Ingram Motors, Inc. v. Ward*, 768 So. 2d 362 (Ala. 1999). Denial of a motion to compel arbitration is reviewable by appeal. *A. G. Edwards & Sons, Inc. v Clark*, 558 So. 2d 358 (Ala. 1990).

FAA. All of the component parts of the newspaper were presumably obtained by The News in interstate commerce. Petitioners purchased the complete newspaper prepared by The News and then resold the complete newspaper locally. Petitioners argued that the circuit court erred by focusing on the overall business of The News rather than the limited transactions encompassed within the Agreement. The News argued that petitioners were an integral part of a system for delivering commercial advertising distributed in interstate commerce.

The court had previously recognized the three categories of regulation subject to the power of Congress under the Commerce Clause described by Chief Justice Rehnquist in *United States v. Lopez*, 514 U.S. 549 (1995) in the case of *Sisters of the Visitation v. Cochran Plastering Co.*, No. 1981513, 2000 WL 264243 (Ala. March 10, 2000). In *Sisters of the Visitation*, the Alabama Supreme Court acknowledged that the involving interstate commerce requirement merited a new level of scrutiny as a result of this Court's holding in *Lopez*. The court inferred that the FAA's requirement that a contract including an arbitration provision "involve" interstate commerce must now substantially affect interstate commerce.[4] Chief Justice Hooper, along with

[4] The court acknowledged that *Lopez* did not overrule *Wickard v. Filburn*, 317 U.S. 111 (1942), which held that farmers' consumption of their own wheat has sufficient effect on interstate commerce to bring them within federal statutes restricting wheat production. But, reading *Wickard* in light of *Lopez*, the court found that whether an action is local or interstate "is to be determined by considering how critical the regulation of all similarly situated persons activity is to the accomplishment of the primary purpose of a statute drawn to regulate an activity clearly having a substantial effect on interstate commerce." *Sisters of the Visitation*, *4.

Justices Maddox and See, dissented. Chief Justice Hooper concluded that this Court's analysis in *Lopez* was not applicable to arbitration cases. *Id.* at *12.

On September 22, 2000, in a per curiam opinion, a divided Alabama Supreme Court denied the mandamus petition in the *Stewart* and *Hyde* cases. Instead of following this Court's holdings in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000) and its own holding in *Sisters of the Visitation*, the court chose to rely on two antitrust cases, *Lorain Journal Co. v. United States*, 342 U.S.143 (1951) and *Evening News Publ'g Co. v. Allied Newspaper Carriers of New Jersey*, 263 F.2d 715 (3d Cir. 1959), cert. denied, 360 U.S. 929 (1959). The court concluded that while the immediate actions of newspaper distribution only involved intrastate commerce, such actions were a part of a much larger "flow" of interstate commercial activity and that petitioners "were integral and inseparable parts of the flow of interstate commerce." (App. A9). As a result, the court found that the circuit court properly directed arbitration pursuant to the arbitration provisions in the Agreements. *Id.*

Justice Lyons, along with Justices Cook and England, dissented. Justice Lyons noted that the per curiam opinion could not be reconciled with this Court's holdings in *Lopez* and *Morrison*. He also pointed out that the case for applying *Wickard*'s aggregation principle was not as compelling in regard to the FAA as it was in regard to statutes purporting to control prices or prevent monopolies. (App. A13). "The [United States Supreme] Court's describing *Wickard* as the 'most far reaching example' .... suggest[s] that *Wickard* is not a standard to be trotted out and applied willy-nilly whenever Congress attempts to regulate activities in inter-

state commerce." (App. A12). Justice Lyons was unable to conclude that the performance of the contract had the requisite substantiality of effect on interstate commerce so as to justify applying the FAA. "To hold otherwise would assume that the framers of the United States Constitution intended that Congress could require arbitration of a contract between a local newspaper and a young person in the neighborhood who throws papers from his or her bicycle." (App. A18).

Justice Houston concurred specially, to express his opinion "I go with the flow." (App. A9). Justice Houston concluded that "neither the words nor the reason of the majority opinion in *Sisters of the Visitation* [and *Lopez* and *Morrison*] has any precedential value in a case involving an activity in which the flow of commerce must continue in order to fulfill the purpose of the activity." (App. A10).

On November 3, 2000, the Alabama Supreme Court reversed the circuit court's order in *Horn* denying the motion to compel arbitration. (App. A31). The appellate court summarily reversed the order on the authority of *Ex parte Stewart* and remanded the case to the circuit court for an order granting the motion to compel arbitration.

The Alabama Supreme Court denied the applications for rehearing in the *Stewart* and *Hyde* cases on December 1, 2000, and in the *Horn* case on February 23, 2001. (App. A19-A25, A37).

REASONS FOR GRANTING THE WRIT

1. The Alabama Supreme Court's Decisions Resolved a Federal Question in a Manner that Conflicts with Decisions of this Court.

If an arbitration agreement concerns a transaction involving interstate commerce, then the FAA applies and preempts state law. 9 U.S.C. § 2. If the contract does not involve interstate commerce, then state law controls. *Southland v. Keating*, 465 U.S. 1, 10 (1984). In *Allied-Bruce Terminix Cos. v. Dodson*, 513 U.S. 265 (1995), this Court held that for an arbitration clause to be enforceable under the FAA, the transaction to which the contract relates must involve interstate commerce regardless of the contemplation of the parties. In reaching this conclusion, the Court held that "involving commerce" under the FAA was the functional equivalent of "affecting commerce" and that the phrase should be read broadly to permit a reach coinciding with that of the Commerce Clause.[5] *Id.* at 273.

The "involving commerce" requirement now merits scrutiny because of this Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000). Those cases firmly established that the Commerce Clause limits Congress's reach to matters that "substantially affect" interstate commerce. Yet the Alabama Supreme Court's decisions below were not based upon findings of a substantial effect on interstate commerce. Instead, the court concluded that the local distribution of newspapers involved interstate commerce because the distribution

[5] The Commerce Clause delegates to Congress the power to regulate commerce among the several states. U.S. CONST. art. 1, § 8.

was a part of a much larger "flow" of interstate commercial activity and that the flow of interstate commerce did not end when the newspaper was assembled after publication. This holding conflicts with *Lopez* and *Morrison*.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court considered the extent of interstate involvement an activity must have in order for it to be within the bounds of Congress's authority under the Commerce Clause. In *Lopez*, the Court struck down the conviction of a boy who had brought a handgun to school, holding that the Gun Free School Zones Act, 18 U.S.C. § 922(q), exceeded Congress's power to legislate under the Commerce Clause. The Government unsuccessfully argued that possession of a gun near a school might lead to violent crime, which would disrupt education, and that education was necessary for the nation's economic productivity. The Court held that the Act's relationship to commerce was too tenuous to withstand constitutional scrutiny. 514 U.S. at 567.

In reaching this conclusion, the Court explained that there are three categories of activities that Congress has properly regulated under the Commerce Clause: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities having a substantial relation to interstate commerce. *Id.* at 558-59. As to that third category, the Court acknowledged that the case law was unclear as to whether an activity must "affect" or "substantially affect" commerce in order to be within Congress's reach under the Commerce Clause. The Court concluded that the proper test requires that the regulated activity "substantially affect" commerce. *Id.* at 557.

It is this third category which is implicated here. The *contract at issue in this case* does not entail use of channels of interstate commerce nor regulation and protection of the instrumentalities of interstate commerce. (App. A11). Thus, unless the contract has a substantial relation to interstate commerce, it should not be regulated by federal law.

It has been six years since this Court announced in *Lopez* that there was an outer limit to Congress's Commerce Clause power, and that the Court would police that limit. A majority of this Court recently affirmed its commitment to policing that limit in *United States v. Morrison*, 529 U.S. 598 120 S. Ct. 1740 (2000). In *Morrison*, this Court held that Congress lacked the authority under the Commerce Clause to enact the Violence Against Women Act, 42 U.S.C. § 13981, which gave rape victims and battered spouses a federal cause of action to sue their attackers.

Morrison refined the third category of interstate activity and provided further analytical guidance for recognizing a substantial effect on interstate commerce. This Court looked to four additional factors to determine whether the Congressional act at issue substantially affects interstate commerce. 120 S. Ct. at 1749-1750. Courts are directed to inquire (1) whether the statute regulates commerce or an activity that might be deemed an economic activity; (2) whether the statute has an "express jurisdictional element" that restricts its application to activities that have "an explicit connection with or effect on interstate commerce"; (3) whether congressional findings support the judgment that the activity in question has a substantial effect on interstate commerce; and (4) whether there is a link between the activity and a substantial effect on interstate com-

merce that is not so attenuated that the federal-state balance is destroyed. *Id.*

First, the reviewing court should consider the commercial or economic nature of the regulated activity.[6] If the activity is neither commercial nor an essential part of a larger regulation of some commercial activity, then that activity cannot be regulated under the Commerce Clause. The Court found that in both *Lopez* and *Morrison*, neither the actors nor the conduct of the regulation had a commercial character and neither the purpose nor the design of the statute had an evident commercial nexus.[7] If the intrastate activity is either commercial or its regulation is necessary to the regulation of a commercial activity, then a reviewing court must inquire into the second subpart.

Second, the *Morrison* Court determined that the lack of an express jurisdictional element in the *Lopez* statute weakened the claim that Congress was acting within its Commerce Clause powers.[8] "Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce." 120 S.

---

[6] The Court used the words "economic" and "commercial" interchangeably.

[7] In both *Lopez* and *Morrison*, the financial effects of the prohibited conduct were not disputed. It is apparent that the Court examined the prohibited conduct without reference to its economic effects.

[8] "While the [FAA] creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction...." *Southland v. Keating*, 465 U.S. 1, 13 n.9 (1984). *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). See also *Allied-Bruce Terminix Cos. v. Dodson*, 513 U.S. 265, 290 (1995)(Thomas, J., dissenting)(Section 2 of the FAA does not give rise to federal question jurisdiction).

Ct. at 1750. Third, the Court found that while Congress was not required to make formal findings regarding the effect on interstate commerce, "the existence of such findings may 'enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye.'"[9] *Id.* at 1750 (quoting *Lopez*, 514 U.S. at 553). Finally, the Court cautioned against accepting an "attenuated" connection between the regulation and the interstate activity. *Morrison*, 120 S. Ct. at 1750. The Alabama Supreme Court's opinion in this case conflicts with the first and fourth factors.

A. The Economic Activity of the Local Delivery of Newspapers Does Not Substantially Affect Interstate Commerce.

In *Lopez* and *Morrison*, this Court stressed the importance, in decisions delineating the scope of federal power under the Commerce Clause, of a particularized inquiry into the relationship between the economic activity being regulated and interstate commerce. "[D]epending on the level of generality, any activity can be looked upon as commercial." *Lopez*, 514 U.S. at 565. Thus, the commerce power is limited to laws affecting "a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* at 561.

The decision of the Alabama Supreme Court demonstrates how courts can evade the holding of *Lopez* by categorizing conduct at an exceedingly high level of generality. Rather than looking to the particular subject of the regulation at issue to determine whether the

[9] The legislative history to the FAA is ambiguous. *Southland*, 465 U.S. at 7.

aggregate effects of the local delivery of newspapers substantially affected interstate commerce, the lower court focused on the commercial effects of newspaper publication in general. The relevant inquiry, however, is not the aggregate commercial effects of newspaper publication, but the aggregate commercial effects of local delivery of the newspaper. Though the local delivery of newspapers is commercial, it is certainly not interstate. See *Jones v. United States*, ___ U.S. ___, 120 S.Ct. 1904 (2000)(property occupied and used by its owner not for any commercial venture, but as a private residence, did not fall within coverage of federal arson statute and fact that residence was used in the interstate receipt of natural gas, a mortgage and an insurance policy did not bring it within the ambit of the statute).

This inquiry is entirely consistent with *Wickard v. Filburn*, 317 U.S. 111 (1942). In that case, the Secretary of Agriculture assessed a penalty on an Ohio farmer for harvesting more wheat than was allotted under the Agricultural Adjustment Act of 1938. Because the penalty was calculated on the basis of wheat grown solely for on-farm consumption, the farmer challenged the application of the Act, contending that such wheat was not part of interstate commerce. This Court rejected that argument, not on the ground that agricultural transactions as a whole substantially affect interstate commerce, but based upon a particularized inquiry into the aggregate commercial effects of on-farm wheat production. 317 U.S. at 125-127. Noting that an individual farmer's "contribution to the demand for wheat may be trivial by itself," the Court found it dispositive that such a contribution, when "taken together with that of many others similarly situated, is far

from trivial. *Id.* at 127-128. Viewed as a whole, "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions." *Id.* at 128. Even "assum[ing] that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce."[10] *Id.*

Even under *Wickard*'s reasoning, "which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S. at 560, the relevant focus is not on the aggregate commercial effect of the *class of activity* to which the regulated activity belongs, but on the aggregate commercial effect of the *specific* activities at issue in the case.[11] Rather than look to the contract and the specific activity at

---

[10] The statute in *Wickard* was part of Congress's effort to deal with the economic depression affecting the Nation at that time. Similarly, Title II of the 1964 Civil Rights Act was designed to address the national concern for civil rights. *See Katzenbach v. McClung,* 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964). The Commerce Clause is an appropriate vehicle for Congress to address issues of national concern where purely interstate activity in the aggregate substantially affects commerce. There is a compelling need for Congress to address issues affecting commerce such as unfair competition, economic crises and civil rights. However, unlike the Civil Rights cases, there is *no compelling need* for Congress to apply the FAA to private contracts unless the effect upon interstate commerce is substantial. *See* Jeffrey Ghannam, *Serving Up Civil Rights,* 87 A.B.A. J. 44 (2001).

[11] Justice Kennedy expressed his concern about exercise of federal power where "neither the actors nor their conduct have a commercial character" at least in part because "any conduct in this interdependent world of ours has an ultimate commercial origin or consequence." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

issue (local delivery of newspapers) to determine whether the aggregate effects substantially affect interstate commerce, the Alabama Supreme Court focused on the commercial and economic effects of publication of *The News* in general. The Alabama court recognized that "[t]he Agreement required [petitioners] to distribute advertising inserts designated by The News as part of the complete newspaper, which were prepared, printed, and shipped to The News in interstate commerce, and news content, designated as part of the complete newspaper by The News that was obtained by The News in interstate commerce."[12] (App. A6).

In his dissent in *Sisters of the Visitation*, Chief Justice Hooper reasoned that *Lopez* did not apply to arbitration cases because he concluded that *all arbitration cases* involve purely commercial activities. *Sisters of the Visitation*, *12 (Hooper, C. J., dissenting). That conclusion formed the basis for the Alabama Supreme Court's decision in this case. In other words, the Alabama Supreme Court believed that the analysis under *Lopez*'s substantial effects test should cease when the intrastate activities being regulated are determined to be commercial.[13] This conclusion is fundamentally at odds

---

[12] See *United States v. American Building Maintenance Indus.*, 422 U.S. 271 (1975) ("Simply supplying localized services to a corporation engaged in interstate commerce does not satisfy the 'in commerce' reguirement" of §7 of the Clayton Act.)

[13] *See United States v. Wall*, 92 F.3d 1444, 1462 (6th Cir. 1996) (Boggs, C.J. concurring in part and dissenting in part) ("Some have contended that analysis under *Lopez's* substantial effects test should cease when intrastate activities being regulated are determined to be commercial. I do not think that this is the proper way to read *Lopez*.").

with *Lopez*.[14] This Court could not have intended to imply that all commercial activities could be regulated when it said that the Guns Free Safety Zone Act "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 115 S.Ct. at 1130-31. Otherwise, the word "interstate" in the Commerce Clause would be rendered a nullity. *See also Solid Waste Agency v. Army Corps of Engineers*, __v.s.__, 121 S. Ct. 675 (2001) ("We would have to evaluate the precise object or activity that, in the aggregate, substantilly affects interstate commerce.").

The aggregate commercial effect in this case was purely intrastate. The economic activity arising out of the Agreement was limited to Birmingham, Alabama. Only by resorting to so exaggerated a level of generality could the Alabama Supreme Court identify any effect on interstate commerce. Moreover, there was no effort by the Alabama Supreme Court to identify any *substantial*

---

[14] The Alabama Supreme Court has been inconsistent in its application of this Court's holdings in *Lopez* and *Morrison* to arbitration cases. The Alabama Court initially refused to apply *Lopez* to arbitration cases. See *Hurst v. Tony Moore Imports, Inc.*, 699 So. 2d 1249, 1257 (Ala. 1997)(plurality opinion)("we do not view *Lopez* as signaling a retreat by the Supreme Court from its expansive interpretation of 'interstate commerce' in cases clearly involving commercial transactions"). The Court later embraced the concept that the *Lopez* requirement of substantial effect governed the question of whether a particular contract has a sufficient connection with interstate commerce to be governed by the FAA. See *Sisters of the Visitation v. Cochran Plastering Co. Inc.*, No. 1981513, 2000 WL 264243 (Ala. March 10, 2000); *Southern United Fire Ins. Co. v. Knight*, 736 So. 2d 582 (Ala. 1999); *Rogers Foundation Repair, Inc. v. Powell*, 748 So.2d 869 (Ala. 1999). The court has now come full circle in this case by retreating from *Lopez*.

effect on interstate commerce, the Alabama Supreme Court dispensed with any meaningful limits on the commerce power. Thus, the lower court's holdings are generally too broad and are in disharmony with *Lopez* and *Morrison*.

B. Any Link Between the Local Delivery of Newspapers and Interstate Commerce Is Too Attenuated a Connection to Interstate Commerce.

The final factor under *Morrison* requires an attenuation analysis. In *Morrison*, this Court cautioned against accepting an "attenuated" connection between the regulation and the interstate activity.[15] *Morrison*, 115 S. Ct. at 1750. The Court noted that the rationale supporting the Violence Against Women Act would justify federal regulation of "any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption," along with other areas of traditional state regulation whose "aggregate effect ... on the national economy is undoubtedly significant." (*Id.* at 1752-53). Concerned that casual, "but-for" arguments could lead to an evisceration of any limitations on federal power, the Court held Congress to a more direct link. *Id.*

The Alabama Supreme Court's opinion conflicts with *Lopez* and *Morrison* with respect to this factor. Any supposed link between the local delivery of newspapers and interstate commerce, if one exists, would be so

---

[15] In *Lopez*, the Court emphasized that the government's reasoning would permit Congress to "regulate not only all violent crime, but also all activities that might lead to violent crime," as well as any activity "related to the economic productivity of individual citizens." 514 U.S. at 564.

attenuated that it could be used to also justify a general federal police power of all contracts. The "flow" rationale relied on by the Alabama Supreme Court in this particular instance involves a causal chain that *would never end*. Under this rationale, *everything* would affect interstate commerce.[16]

> Even assuming that ink, paper, advertising, news content and photographs were provided to The News in interstate commerce at some point during production of the newspaper, such a connection to interstate commerce is so nebulous that it provides no useful boundary under the Commerce Clause in evaluating whether local delivery of newspapers affects interstate commerce. According to *Morrison*, allowing such remote factors to govern constitutional limitations would allow Congress to "completely obliterate the Constitution's distinction between national and local authority. *Morrison*, 120 S. Ct. at 1752.

---

[16] The Alabama Supreme Court's opinion is a clear example of what this Court cautioned against in *Maryland v. Wirtz*: the use of "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968). See also *Gulf Oil Corp. v. Copp Paving Co., Inc*, 419 U.S. 186, 198 (1974) (a "chain of connection" that "ha[d] no logical endpoint resulted in "nebulous" jurisdictional limits and did not provide an acceptable "'nexus' to commerce"); *FERC v. Mississippi*, 456 U.S. 742, 759 n.23 (1982) (Congress may not "regulate in an area that is only tangentially related to interstate commerce").

II. The Decisions of the Alabama Supreme Court Is Erroneous as a Matter of Statutory Interpretation and Constitutional Law.

There is no question but that The News engages in interstate commercial activity with respect to the publication of its newspaper. However, the Alabama Supreme Court concluded that the "flow" of interstate commerce did not end with publication of *The News*, and that as a result, petitioners were an integral part of a system for delivering commercial advertising distributed in interstate commerce. In reaching this conclusion, the court relied on *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) and *Evening News Publ'g Co. v. Allied Newspaper Carriers of New Jersey*, 263 F.2d 715 (3d Cir. 1959), *cert. denied*, 360 U.S. 929 (1959).

Both of these cases involved attempts by newspaper companies, which enjoyed dominant positions as regional newspapers, to restrain interstate commerce. The cases dealt specifically with whether federal court jurisdiction existed under the Sherman Act, 15 U.S.C. § 1, *et seq*. In neither of these cases did the Court hold that the interstate character of a newspaper business was the determining factor for federal jurisdiction. See *Page v. Work*, 290 F.2d 323, 331 (9th Cir. 1961). The relevant Congressional scheme involved in the *Lorain Journal* and *Evening News* cases was preventing monopolies and restraints of trade.

This case involves the Federal Arbitration Act, a statute requiring arbitration of contracts involving interstate commerce. A statute designed to protect competition is not interchangeable with a statute authorizing arbitration between private parties. It is true that both the antitrust statute and the FAA are grounded in

the authority conferred upon Congress by the Commerce Clause. However, the nexus between the applicability of the statute to local transactions and the fulfillment of the Congressional scheme is not nearly as direct or logical in the context of a statute calling for arbitration of disputes arising from contracts involving interstate commerce as it is in the context of a statute regulating competition. (App. A13).

The decision of the Alabama Supreme Court is simply erroneous. The Fourth Circuit Court of Appeals addressed a similar argument and held the opposite. The argument in *Schroepfer v. A.S. Abell Co.*, 138 F.2d 111 (4th Cir. 1943), *cert. denied*, 321 U.S. 763 (1944), was that rackmen, who were engaged in the local distribution of newspapers after they had been printed, were integral parts of the flow of interstate commerce. The federal appellate court rejected the argument:

> It is argued that what plaintiffs do is merely a part of the interstate gathering and distribution of news in which defendant is engaged; that the process which begins with the collection of news, admittedly an interstate activity, is not ended until the paper is placed in the hands of the customer or reader; and that plaintiffs' work is an integral part of the process. The fallacy of the argument consists in assuming that defendant is engaged in the sale of news. As a matter of fact it is engaged herein in the sale of papers. It is news, of course, that makes the papers valuable; but it is the papers, not the news, that it is selling. If the sale of papers be regarded as the sale of news, it is news processed in the course of publication into an entirely new article of commerce. When papers are sold across the state lines, interstate commerce is involved in such

> sale. When the news printed or the material used in the paper is transported cross state lines interstate commerce is necessarily "affected" by anything that affects the publication and sale of papers. *By no possible construction, however, can sale or transportation of papers within the state of their publication be said to be in itself interstate commerce.* The publisher of a newspaper is a manufacturer of the printed papers. News reports, paper stock, ink and everything else that goes into the making of the papers are raw materials that he uses in their manufacture; and these raw materials lose their identity and the interstate character which may have attended them when given this new form. A sausage manufacturer who sell this product intrastate would hardly be said to be engaged in interstate commerce with respect to such intrastate sales merely because he purchases the materials that go into the sausages in interstate commerce. Yet this would be just as sensible as to say that local sales of a newspaper are in interstate commerce because news is acquired for publication in the paper through an interstate service.

138 F.2d at 114. (emphasis added).

The *Schroepfer* court concluded that "[t]here could hardly be a more purely intrastate activity than the sale of newspapers in a particular small part of a large city, especially where the newspaper is locally produced in the same city." *Id.* The Alabama Supreme Court reached an erroneous conclusion because it focused on the commercial effect of *publication* of *The News* in general rather than on the effect of the *local delivery* of newspapers. Petitioners deliver newspapers in the same city in which the newspaper is locally produced.

They are not integral parts of the flow of interstate commerce. The decision of the Alabama Supreme Court is erroneous as a matter of statutory interpretation and constitutional law.

III. The Questions Presented Are Important.

The questions presented are sufficiently important for this Court to review. If *Lopez* and *Morrison* recognize meaningful limits on Congress's Commerce Clause power, this Court must definitively articulate those limits to guide lower courts in their analysis and application of federal statutes. The questions presented in this case can be expected to recur frequently in the future as arbitration cases are dominating the lower courts.[17] Unless this Court provides guidance, the lower courts will continue to struggle with the application of this Court's holdings in *Lopez* and *Morrison* to arbitration cases. Prompt resolution of the important and recurring issues in this case is necessary to give lower courts much needed guidance on the proper application of the aggregation principle.

---

[17] In the three years preceding November, 2000, the Alabama Supreme Court rendered 135 arbitration-related decisions. *See* David G. Wirtes, Jr., *Suggestions for Defeating Arbitration*, 24 Am.J. Trial Advoc. 111 (2000). Since November, 2000, the Court has rendered 22 such decisions. In the majority of the arbitration-related cases decided by the Alabama Supreme Court, the issue on appeal dealt with interstate commerce challenges. *See also* Thomas J. Methvin, *Alabama - The Arbitration State*, 62 Ala. Law. 48 (2001); F. M. Haston, III, *Arbitration in Alabama - Of Road Signs and Reality*, 62 Ala. Law. 62 (2001); Caroline E. Mayer, *"Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided,"* The Wash. Post, March 1, 2000, at E01. (Of the 51,622 arbitration claims initiated by First USA (a credit card company), company won 99.6% of the cases in arbitration.)

The Alabama Supreme Court upheld federal regulation of a contract which is neither commercial in nature nor interstate when it found that the petitioners' transactions with The News were integral and inseparable parts of the flow of interstate commerce. The effect of the opinion is that courts are entitled to "automatically" conclude that proximity to interstate contracts in and of itself warrants the conclusion that the subject contract substantially affects interstate commerce. The court's opinion advocates an extreme and absolute rule that in reality subjects all contracts to the FAA. It would be difficult to envision any contract that would be immune from federal control.

The lower court's holding demonstrates how courts can evade the holding of *Lopez* by categorizing conduct at an exceedingly high level of generality. The proper focus should be on the contract between the parties and the question should be whether performance of the contract by petitioners substantially affects interstate commerce. Any other rule would, in reality, subject all contracts to the FAA no matter how small or local and would thereby violate and further erode constitutional principles of federalism. As Justice Lyons recognized in *Sisters of the Visitation*:

> One cannot seriously argue that unless all transactions, some of which by themselves might have only a local influence or at most an indirect connection to interstate commerce, come within the scope of the FAA, that Act will become some sort of scarecrow, lacking substance and a field of operation, so that Congress's primary purpose will be defeated. Such an expansive application of the FAA would tend to defeat the doctrine of federalism, making that doctrine a hollow shell."

Sisters of the Visitation v. Cochran Plastering Co., Inc., No. 1981513, 2000 WL 264243 at *8-9 (Ala. March 10, 2000). It is essential to our system of government that the commerce power not extend to effects on interstate commerce that are so remote that we "would effectually obliterate the distinction between what is national and what is local." *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

LEAH O. TAYLOR
Counsel of Record
RHONDA PITTS CHAMBERS

TAYLOR & TAYLOR
2130 Highland Avenue
Birmingham, Alabama 35205
(205) 558-2800

Attorneys for Petitioners

APPENDIX

INDEX TO APPENDICES

APPENDIX A

September 22, 2000 Opinion of Alabama Supreme Court in Case Nos. 1990418 and 1990419 styled *Ex parte Hugh Stewart and Ex parte Kameron Hyde (Re: Hugh Stewart v. The Birmingham News Company; and Kameron Hyde v. The Birmingham News Company)*

APPENDIX B

December 1, 2000 Order of Alabama Supreme Court in Case Nos. 1990418 and 1990419 styled *Ex parte Hugh Stewart and Ex parte Kameron Hyde (Re: Hugh Stewart v. The Birmingham News Company; and Kameron Hyde v. The Birmingham News Company)*

APPENDIX C

October 27, 1999 Order of Judge G. William Noble in the Circuit Court of Jefferson County, Alabama, in Civil Action No. CV-99-4313 styled *Hugh Stewart v. The Birmingham News Company*

APPENDIX D

October 27, 1999 Order of Judge G. William Noble in the Circuit Court of Jefferson County, Alabama, in Civil Action No. CV-99-4314 styled *Kameron Hyde v. The Birmingham News Company*

APPENDIX E

November 3, 2000 Order of Alabama Supreme Court in Case No. 1990700 styled *The Birmingham News Company v. Sherry Horn*

APPENDIX F

November 23, 1999 Order of Judge William A. Jackson in the Circuit Court of Jefferson County, Alabama, in Civil Action No. CV-99-4243 styled *Sherry Horn v. The Birmingham News Company*

APPENDIX G

February 23, 2001 Order of Alabama Supreme Court Case No. 1990700 styled *The Birmingham News Company v. Sherry Horn*

APPENDIX H

Title 9, section 1

APPENDIX I

Title 9, section 2

APPENDIX A

REL: 09/22/2000

SUPREME COURT OF ALABAMA
SPECIAL TERM, 2000

1990418 and 1990419

Ex parte Hugh Stewart
Ex parte Kameron Hyde
PETITIONS FOR WRIT OF MANDAMUS
(Re: Hugh Stewart
v.
The Birmingham News Company;
and
Kameron Hyde
v.
The Birmingham News Company)
(Jefferson Circuit Court, CV-99-4313, and -4314))

PER CURIAM.

Hugh Stewart and Kameron Hyde, the plaintiffs in actions pending in the Jefferson County Circuit Court, have petitioned for a writ of mandamus directing the trial court to vacate its order compelling them to submit their claims to arbitration. We deny the writs.

The Birmingham News newspaper is published by The Birmingham News Company ("The News") and is sold through a mixed distribution system consisting of employees of The News and independent dealers ("Dealers") who are authorized to act as the exclusive distributors of the newspaper in specific geographical areas. The plaintiffs became Dealers by executing an "Independent News Dealer Agreement" (the "Agreement")

with The News — Stewart in 1988 and Hyde in 1994. Pertinent portions of the Agreement read:

"4. *Deliveries*:

"[Dealers] shall make regular and prompt deliveries on the date of publication of complete newspapers intact, including preprints, supplements, and inserts designed by [The News] only, to his subscribers and customers in a manner satisfactory to them (e.g., in a dry and readable condition). ...

"....

"8. *Term*:

"This Agreement shall exist and be in force until [one year from date of execution], and thereafter shall be automatically renewed from year to year unless terminated by either party by giving the other party written notice of termination on or before thirty (30) days prior to the annual renewal date. In the event of the failure of either party to perform any of its obligations under the Agreement, the other party may terminate this Agreement upon prior written notice, subject, however, to the provision of Paragraph 10 herein. Notice shall be given hereunder by depositing the same in the United States mail, postage prepaid, and addressed to the other party at his business hereinabove set out.

"....

"10. *Arbitration*:

"Except as herein provided, and as provided in any other provision of this Agreement, all claims

> and controversies arising out of this contract shall be submitted to arbitration for determination. It is agreed, however, that if either party shall terminate this contract by reason of the alleged breach thereof by the other party, the sole issues for determination shall be whether or not the termination was valid, whether or not either party shall be entitled to money damages, and, if so, the amount thereof, which issues only shall be submitted to arbitration. It is expressly agreed that in case of such termination neither party shall be entitled to have this Agreement reinstated nor to be restored to his or its status thereunder, notwithstanding the fact that it may be determined that the termination by the other party was not warranted. ..."

According to the plaintiffs, in 1997 The News made changes to its distribution system that adversely affected the Dealers' ability to function properly under the Independent News Dealer Agreement. For example, the plaintiffs contend that The News changed its customer-rating procedures in a way that caused Dealers to be held responsible for complaints about service problems over which they had no control. In 1998, The News notified the plaintiffs that their Agreements would not be renewed because, it said, complaints about their service "were at a totally unsatisfactory level."

Although the Agreement provided that either party could terminate it without cause by giving written notice 30 days before its expiration, the plaintiffs sued The News, each alleging that the Agreement obligated The News to act in good faith and to maintain a relationship with a Dealer as long the Dealer performed satisfactorily, and that the "unsatisfactory-performance" reason given for nonrenewal of their contracts was a

pretext. The plaintiffs claimed that The News had engaged in a scheme designed to eliminate the Dealers and to obtain their distributorships (which, the plaintiffs allege, had become very profitable over the years), without compensation, in order to obtain the Dealers' profits and to establish a monopoly in the newspaper publishing and retail-distribution market. The plaintiffs alleged breach of contract, fraud, conspiracy, violation of Alabama's antitrust statute (Ala. Code 1975, § 6-5-60), unjust enrichment, tortious interference with a business relationship, and deceptive trade practices.

The News moved to stay the proceedings in the circuit court and to compel arbitration pursuant to Paragraph 10 of the Agreement. The plaintiffs opposed the motion. After a hearing on the motion, the trial court granted it and ordered the parties to arbitrate. The plaintiffs now seek a writ of mandamus directing the trial court to vacate its order compelling arbitration of their claims against The News.

Mandamus is an extraordinary remedy and requires a showing of 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court. When an appellate court engages in mandamus review of a trial court's order granting a motion to compel arbitration, the appellate court applies a de novo standard of review. See *Ex parte Inverness Constr. Co.*, [Ms. 1981698, July 14, 2000], ___So. 2d___ (Ala. 2000); *Ex parte Stamey*, [Ms. 1981629, June 30, 2000] ___ So. 2d ___ (Ala. 2000); *Ex parte Roberson*, 749 ___ So. 2d ___ 441 (Ala. 1999).

In *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), the United States Supreme Court held that the

words "involving commerce" in the Federal Arbitration Act, 9 U.S.C. § 2 ("FAA"), are broader than the often-found words of art "in commerce." The Court held, therefore, that they cover more than only persons or activities within the flow of interstate commerce. See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974) (defining "in commerce" as related to the "flow" and defining the "flow" to include "the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer"). The Court went on to hold that the word "involving" is the functional equivalent of the word "affecting," and that the phrase "affecting commerce" normally signals a congressional intent to exercise its Commerce Clause powers to the full. 419 U.S. at 201.

The plaintiffs contend that nothing in the Agreement indicates that it involves interstate commerce within the meaning of the FAA; they further contend that an affidavit filed by The News in support of its motion merely established that *The News* engages in interstate commerce. The plaintiffs argue that the trial court erred by focusing, they say, on the "overall business" of The News rather than on the limited transactions evidenced by the Agreement.

The News bore the burden of proving to the trial court that the Agreement involved interstate commerce, so as to invoke the FAA and render enforceable the arbitration clause in the Agreement. *Sisters of the Visitation v. Cochran Plastering Co.*, [Ms. 1981513, March 10, 2000] ___ So. 2d ___ (Ala. 2000); *Transouth Fin. Corp. v. Bell*, 739 So. 2d 1110 (Ala. 1999).

Attached to The News's motions to stay the civil actions and to compel arbitration were affidavits of Toby

Pearson, the circulation director for The News. In his affidavits, Pearson acknowledged that the plaintiffs and The News had entered into the Agreement and that under the Agreement the plaintiffs bought complete newspapers from The News and distributed them to homes, newsstands, news racks, and other places within defined territories for the period of a year. Pearson affirmed:

> "3. Virtually all of the inserts that are included as part of *The Birmingham News*, such as Sunday comics, Parade magazine, React magazine, and advertising inserts for national retail chains such as Rich's, Sears, and others, are prepared, printed, and shipped to The News from companies located outside the State of Alabama.
>
> "4. The News also obtains a significant portion of its news content and photographs from outside the State, under agreements with news services such as The Associated Press, Universal Press, Knight Ridder Tribune, and King Features."

The plaintiffs do not dispute this. Therefore, the Agreement required them to distribute advertising inserts designated by The News as part of the complete newspaper, which were prepared, printed, and shipped to The News in interstate commerce, and news content, designated as part of the complete newspaper by The News, that was obtained by The News in interstate commerce.

Did the flow of interstate commerce end when these inserts and this news content were delivered to The News? The plaintiffs contend it did, and the dissenting Justices agree. The plaintiffs cite the following cases to support their contention: *United States v. American*

Bldg. Maintenance Indus., 422 U.S. 271 (1975); *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943); *Burke v. Ford*, 377 F.2d 901 (10th Cir. 1967); *Page v. Work*, 290 F.2d 323 (9th Cir. 1961); *Wirtz v. M & B Constr. Co.*, 216 F. Supp. 169 (S.D. Fla. 1963); *Ouendag v. Gibson*, 49 F. Supp. 379 (W.D. Mich. 1943); *Hurst v. Tony Moore Imports, Inc.*, 699 So. 2d 1249 (Ala. 1997).

The News contends that the plaintiffs were an integral part of a system for delivering commercial advertising distributed in interstate commerce, citing, among other cases, *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); and *Evening News Publ'g Co. v. Allied Newspaper Carriers of New Jersey*, 263 F.2d 715 (3d Cir. 1959), cert. denied, 360 U.S. 929 (1959).

In *Lorain Journal*, the United States Supreme Court analyzed the interstate activity of a daily newspaper located in Lorain, Ohio:

> "The distribution within Lorain of the news and advertisements transmitted to Lorain in interstate commerce for the sole purpose of immediate and profitable reproduction and distribution to the reading public is an inseparable part of the flow of the interstate commerce involved."

342 U.S. at 152.

The United States Court of Appeals for the Third Circuit reached the same conclusion in *Evening News*, which involved a group of news dealers who tried to force a newspaper to eliminate home delivery of some of its newspapers by newsboys. The newspaper sued the dealers, alleging violations of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). The dealers argued, as the plaintiffs argue here, that their relationship with the

newspaper was intrastate in nature because they delivered newspapers only within their home state. The Third Circuit disagreed with the dealers:

> "The truncated argument advanced would have us forget completely that interstate commerce is an inseparable, indispensable part of this ... newspaper. The News does furnish neighborhood, city, county and state news to its readers. And by far the major portion of its sales are in New Jersey. But an essential element of its being (perhaps considering its territory and the present state of this world of ours its most essential element) is the obtaining, dissemination and interpretation of national and world-wide news. Intrastate advertising is necessary to the economic life of the paper and necessary to its readers. Interstate advertising affects the paper and its readers to a lesser degree but affect them it does appreciably. To place that news and advertising in the hands of New Jersey people requires, as the United States Supreme Court said in [*Lorain*], 'continuous interstate transmission of materials and payments to say nothing of the interstate commerce involved in the sale and delivery of product[s] sold.' The end result, the distribution of the News, as a complete newspaper containing those news items and advertisements, to its reading public in Newark or any other New Jersey area is, as the Court held in [*Lorain*], '... an inseparable part of the flow of the interstate commerce involved.'"

263 F.2d at 717.

The Third Circuit found that "home delivery of the News is an integral part of the interstate operation."

263 F.2d at 717. We agree with the Third Circuit's application of *Lorain*, and we conclude that the cases of the plaintiffs now before us are not materially distinguishable from either *Lorain* or *Evening News*.[1]

The petitions for the writ of mandamus are due to be denied. The trial court properly directed arbitration pursuant to the arbitration clauses in the Agreement because the plaintiffs were integral and inseparable parts of the flow of interstate commerce. *Lorain* and *Evening News*.

1990418 — WRIT DENIED.

1990419 — WRIT DENIED.

Hooper, C. J., and Maddox, Brown, and Johnstone, JJ., concur.

Houston, J., concurs specially.

Cook, Lyons, and England, JJ., dissent.

See, J., recuses himself.

HOUSTON, Justice (concurring specially).

I go with the flow.

I concurred in *Sisters of the Visitation v. Cochran Plastering Co.*, [Ms. 1981513, March 10, 2000] ___ So. 2d ___ (Ala. 2000). If, as the dissenting Justices contend, *Sisters of the Visitation* is precedent for granting these

---

[1] We note that we have carefully examined all of the cases cited by the plaintiffs in support of their contention that the flow of interstate commerce ended when the inserts and the news were delivered to The News. We find those cases to be either distinguishable on their facts or otherwise consistent with the holdings in *Lorain* and *Evening News*.

mandamus petitions, then I misunderstood what I was voting on in *Sisters of the Visitation* and I should have concurred only in the result in that case. In my opinion, neither the words nor the reasoning of the majority opinion in *Sisters of the Visitation* has any precedential value in a case involving an activity in which the flow of commerce must continue in order to fulfill the purpose of the activity.

LYONS, Justice (dissenting).

I respectfully dissent. The per curiam opinion ignores Chief Justice Rehnquist's description in *United States v. Lopez*, 514 U.S. 549 (1995), of the three categories of regulation subject to the power of Congress under the Commerce Clause of the United States Constitution, and it fails to distinguish *Sisters of the Visitation v. Cochran Plastering Co.*, [Ms. 1981513, March 10, 2000] ___ So. 2d ___ (Ala. 2000).

Chief Justice Rehnquist in *Lopez* referred to the channels, instrumentalities, and activities having a substantial relation to commerce. We recognized these categories in *Sisters of the Visitation*.

The first category, regulation of the use of the channels of interstate commerce, involves management of the avenues of commerce and control over the items that might move through them, such as intoxicating liquors, convict-made goods, and stolen goods. *Lopez,* 514 U.S. at 558-59. See, also, *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) ("The term 'channel of interstate commerce' refers to, *inter alia*, 'navigable rivers, lakes, and canals of the United States; the interstate railroad track system; the interstate highway system; ... interstate telephone and telegraph lines; air traffic routes; television and radio broadcast frequencies.'" 214 F.3d at 490-91

(quoting *United States v. Miles*, 122 F.3d 235, 245 (5th Cir. 1997), *cert. denied*, 523 U.S. 1011 (1998)).

The second category, regulation of the instrumentalities of interstate commerce, protects things in interstate commerce, for example, by regulating the safety of motor vehicles. *Lopez*, 514 U.S. at 558-59; *Gibbs v. Babbitt*, 214 F.3d at 491. That an item may move in interstate commerce does not make it an instrumentality, or else the weapons shipped in interstate commerce giving rise to violations of the Gun-Free School Zones Act of 1990 would have sufficed to place 18 U.S.C. § 922(q), which was before the Supreme Court in *Lopez*, in the category of regulation of instrumentalities of commerce.

Based upon the illustrations given in *Lopez* dealing with the three categories, I conclude that the delivery of newspapers is not a channel of interstate commerce or an instrumentality of interstate commerce. A contract is neither a channel nor an instrumentality, but suggests instead an activity. The Federal Arbitration Act requires arbitration of "a contract evidencing a transaction involving commerce," 9 U.S.C. § 2, and it defines "commerce" as "commerce among the several States or with foreign nations," 9 U.S.C. § 1. This case, therefore, falls in the third *Lopez* category, dealing with activities; therefore, as was held in *Lopez*, to be subject to regulation by the Congress, the activity must have a substantial effect on interstate commerce.

In order to decide the questions these plaintiffs present, we must, just as we did in *Sisters of the Visitation*, confront *Wickard v. Filburn*, 317 U.S. 111 (1942), where the Supreme Court upheld the constitutionality of regulation of homegrown wheat pursuant to an act of Con-

gress controlling prices of wheat. In *Lopez*, the Court referred to *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." 514 U.S. at 560. Recently, in *United States v. Morrison*, ___ U.S. ___, 120 S. Ct. 1740 (2000), the Court stated: "[I]n every case where we have sustained federal regulation under *Wickard*'s *aggregation principle*, the regulated activity was of an apparent commercial character." ___ U.S. at ___ n.4, 120 S. Ct. at 1750 n.4 (emphasis added). The Court's describing *Wickard* as "the most far reaching example" and its referring to "*Wickard*'s aggregation principle" suggest that *Wickard* is not a standard to be trotted out and applied willy-nilly whenever Congress attempts to regulate activities in interstate commerce. At stake in *Wickard* was Congress's attempt to control prices.

The aggregated effect of a determination that the activity in *Wickard* was wholly intrastate would have frustrated the Congressional purpose for controlling the price of wheat. In *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), and *Evening News Publishing Co. v. Allied Newspaper Carriers of New Jersey*, 263 F.2d 715 (3d Cir.), *cert. denied*, 360 U.S. 929 (1959), the two antitrust cases relied on by the per curiam opinion, the relevant Congressional scheme was to prevent monopolies and restraints of trade. In *Evening News*, the United States Court of Appeals for the Third Circuit observed:

> "The end result, the distribution of the News, as a complete newspaper containing those news items and advertisements, to its reading public in Newark or any other New Jersey area is, as the Court held in *Lorain* (342 U.S. at page 152, 72 S.Ct. at page 185), '*** an inseparable part of the flow of the

> interstate commerce involved.' That Court said further (342 U.S. at page 152, 72 S.Ct. at page 186), '*Without the protection of competition at the outlets of the flow of interstate commerce, the protection of its earlier stages is of little worth.*' ... It should be noted that in *Lorain*, as here, the contention was that merely a local issue was in dispute."

263 F.2d at 717-18 ("outlets" emphasized in *Evening News*; additional emphasis added).

We here deal with the Federal Arbitration Act, a statute requiring arbitration of contracts involving interstate commerce. I do not consider a statute whose purpose is to control wheat prices across the country or a statute whose purpose is to protect competition to be interchangeable with a statute authorizing arbitration. Both the FAA and the antitrust statute are grounded in the authority conferred upon Congress by the Commerce Clause, but the nexus between the applicability of the statute to local transactions and the fulfilment of the Congressional scheme is not nearly as direct or logical in the context of a statute calling for arbitration of disputes arising from contracts involving interstate commerce as it is in the context of a statute establishing price controls or regulating competition.[2] The case for applying "*Wickard*'s aggregation principle" is therefore not as compelling in regard to the FAA as it is in regard to statutes purporting to control prices or prevent monopolies.

---

[2] Justice Houston's special concurrence attempts to distinguish *Sisters of the Visitation* on the ground that it has no applicability in a case "involving an activity in which the flow of commerce must continue in order to fulfill the purpose of the activity." ___ So. 2d at ___. I respectfully submit that such reasoning erroneously conflates the purpose of the statute and the purpose of the activity.

How, then, do we strike a balance that respects Congress's authority and upholds the rights of states over local matters? The United States Court of Appeals for the Fourth Circuit discussed this issue in *Gibbs v. Babbitt*, dealing with the constitutionality of an act regulating the taking of red wolves on private land, as follows:

> "*Lopez* and *Morrison* rest on the principle that where a federal statute has only a tenuous connection to commerce and infringes on areas of traditional state concern, the courts should not hesitate to exercise their constitutional obligation to hold that the statute exceeds an enumerated federal power. Respect for our federal system of government was integral to those decisions. See *Lopez*, 514 U.S. at 561 n.3, 115 S.Ct. 1624; *Morrison*, [___ U.S. at ___,] 120 S.Ct. at 1754-55. Yet *Lopez* also counsels that '[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.' 514 U.S. at 560, 115 S.Ct. 1624. In enforcing limits on the Congress, we must be careful not to overstep the judicial role. To strike down statutes that bear substantially upon commerce is to overstep our own authority even as we fault Congress for exceeding limits on its power. The irony of disregarding limits on ourselves in the course of enforcing limits upon others will assuredly not be lost on those who look to courts to respect restraints imposed by rules of law."

214 F.3d at 491-92.

I would strike the balance by relying upon the standard we set in *Sisters of the Visitation*, a standard that allows us to focus intensely on the specific transaction

before the Court. While that standard considers other interstate contracts of one of the parties that operate in proximity to the contract before the Court ("proximity contracts"), it avoids automatically concluding that proximity to interstate contracts alone warrants the conclusion that the subject contract substantially affects interstate commerce. We held in *Sisters of the Visitation*, after creating a hypothetical transaction involving a farmer mowing pasture lands, a transaction that lacked a substantial effect on interstate commerce, as follows:

> "This hypothetical transaction — an agreement by the farmer to do work for another local landowner — might contain the following components: (1) a contract solely between two local parties, both of them engaging in activities that do not involve any person or entity in another State; (2) tools and equipment, which, although they moved in interstate commerce, were not purchased or leased solely for the farmer to perform the particular contract at issue; (3) substantially more than half of the amount paid to the farmer by the other landowner is allocable to the cost of the services rendered by the farmer, who renders those services without using persons or entities from another State, while substantially less than half of the amount paid is allocable to the cost of materials specially purchased for use or consumption in the farmer's performance of the contract; (4) the object of the services is incapable of subsequent movement across State lines or otherwise having a subsequent substantial effect on interstate commerce; (5) such a degree of separability from any contracts that are subject to the FAA that allowing this contract to remain outside the scope of the Act would not

> substantially disrupt activities that Congress intended to be subject to the Act."

___ So. 2d at ___. In the situation of theplaintiffs now before us, we have no material deviation toward interstate commerce from the hypothetical transaction described above.

In each of the two cases before us, the parties to the transaction are local, but one party, The News, is engaged in an activity that involves numerous contracts between it and out-of-state entities that provide a range of materials and services, including comics, *Parade* magazine, advertising inserts, news content, photographs, paper, and ink. Some of the printed materials expressly solicit interstate business transactions between advertisers and subscribers. The Dealers purchase polyethylene bags and rubber bands from The News. The News obtains these products from outside the State of Alabama. We, therefore, have a deviation toward interstate commerce from the hypothetical transaction based upon the relationship of the parties to other contracts, to which I will return later.

The News makes no showing as to whether equipment, such as delivery trucks and other vehicles necessary to perform the distribution contracts, moved in interstate commerce to the Dealers or were acquired for performance of this contract and used solely in performance of the contract. We have no deviation toward interstate commerce from the hypothetical transaction based upon equipment necessary for the performance of the contract.

The News makes no showing as to the breakdown between the cost of local labor versus the cost of materials of interstate origin, such as equipment and gaso-

line necessary to the performance of the contract. We have no deviation toward interstate commerce from the hypothetical transaction based upon the costs attributable to interstate, as opposed to local, activity.

The newspapers subject to the contract are delivered locally. Any subsequent entrance into interstate commerce as a result of a local subscriber's mailing a clipping to another state is too incidental to warrant further consideration. The subscriber could respond to a solicitation for sale of a product from outside Alabama. However, we have no evidence as to the extent of such activity. We have no deviation toward interstate commerce from the hypothetical transaction based upon subsequent effect on interstate commerce.

The aforementioned proximity contracts are not linked to a showing that litigation, as opposed to arbitration, in connection with The News's contract with the Dealers, would disrupt performance of those proximity contracts with third parties. Indeed, we have no basis on which to conclude that the parties or potential witnesses to these proximity contracts have anything to do with the contract between The News and the Dealers. We have no deviation toward interstate commerce from the hypothetical transaction based upon disruption of proximity contracts with third parties.

The most difficult portion of the test is determining the effect of the proximity contracts and the Dealers' purchases from The News of materials that it obtains from outside Alabama. The materials resulting from the proximity contracts come to rest in Alabama, where The News processes and assembles the completed product. The advertising inserts do not move directly between the Dealer and the merchant purchasing the

advertising. While the contract requires the Dealers to deliver the inserts, that activity is local. The rubber bands and polyethylene bags sold by The News to the Dealers come to Alabama and then are resold by The News to the Dealers. However, there is no indication that the dispute between the parties relates to the sale of these products.

Unquestionably, The News substantially affects interstate commerce in the performance of its proximity contracts. However, the separate contract for the distribution of newspapers affects interstate commerce only to the extent that (a) the contract requires involvement by the Dealers in interstate commerce to perform the contract for distribution, or (b) the distribution itself causes subscribers to purchase goods or services directly from outside Alabama. Based on the absence of evidence to quantify interstate activity in these areas, I am unable to conclude that the performance of the contract between the Dealers and The News has the requisite substantiality of effect on interstate commerce to justify applying the Federal Arbitration Act. To hold otherwise would assume that the framers of the United States Constitution intended that Congress could require arbitration of a contract between a local newspaper and a young person in the neighborhood who throws papers from his or her bicycle.

I must dissent, lest we give too much weight to the interstate activity of The News and thereby disregard the proper focus on the contract between The News and the Dealers and the question whether that contract substantially affects interstate commerce.

Cook, J., concurs.

APPENDIX B

REL: 12/01/2000

SUPREME COURT OF ALABAMA
OCTOBER TERM, 2000-2001

1990418 and 1990419

Ex parte Hugh Stewart
Ex parte Kameron Hyde
PETITIONS FOR WRIT OF MANDAMUS
(Re: Hugh Stewart
v.
The Birmingham News Company;
and
Kameron Hyde
v.
The Birmingham News Company)
(Jefferson Circuit Court, CV-99-4313, and -4314))
On Applications for Rehearing

PER CURIAM.

APPLICATIONS OVERRULED.

Hooper, C. J., and Maddox, Brown, and Johnstone, JJ., concur.

Houston, J., concurs specially.

Cook, Lyons, and England, JJ., dissent

See, J., recuses himself.

HOUSTON, Justice (concurring specially).

I go with the flow.

I concurred in *Sisters of the Visitation v. Cochran Plastering Co.*, [Ms. 1981513, March 10, 2000] ___So. 2d___ (Ala. 2000). If, as the dissenting Justices contend, *Sisters of the Visitation* is precedent for granting these mandamus petitions, then I misunderstood what I was voting on in *Sisters of the Visitation* and I should have concurred only in the judgment in that case. In my opinion, neither the words nor the reasoning of the majority opinion in *Sisters of the Visitation* has any precedential value in a case involving an activity in which the flow of commerce must continue in order to fulfill the purpose of the activity.

In opposition to the applications for rehearing, the Birmingham News Company filed an excellent brief, which I quote from and adopt as part of my special concurrence:

> "[The Supreme Court of Alabama's majority opinion] fits within the broad general category of cases that recognize the authority of Congress to regulate persons or things that are in some sense participating 'in' interstate commerce. See *Reno v. Condon*, 528 U.S. 141 (2000); *United States v. Lopez*, 514 U.S. 549, 557 (1995) ('Congress is empowered to regulate and protect the instrumentalities of interstate commerce, *or persons or things in interstate commerce*, even though the threat may come only from intrastate activities') (emphasis added); Lawrence H. Tribe, American Constitutional Law, § 5-5, at 826 (3d ed. 2000) ('[a]lthough the Court might more comfortably have described it as a separate category, *Lopez* located the regulation of "persons or things 'in' interstate commerce," or "participating in" such commerce, in the instrumentalities branch of the Court's Commerce Clause

> doctrine'). The analysis or test described in *Sisters of the Visitation* does not apply to cases like this one, where the actual persons and things involved are themselves within the flow of commerce. See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974) (which defined 'in commerce' as related to the 'flow' and defining the 'flow' to include 'the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer'). Such persons and things, by definition, substantially affect — because they are components of — interstate commerce. See Lawrence H. Tribe, American Constitutional Law, § 5-5, at 827 (3d ed. 2000).

"Judicial recognition of a 'flow' of interstate commerce is not new. In 1905, Justice Holmes wrote as follows:

> " '[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, *the current thus existing is a current of commerce among the States*, and the purchase of the cattle is a part and incident of such commerce.'

"*Swift & Co. v. United States*, 196 U.S. 375, 399 (1905) (emphasis added). In 1943, in an opinion by Justice Douglas, the United States Supreme Court again discussed the movement of goods in a 'current' of interstate commerce and the authority of Congress to regulate it,

as well as those who participate in it. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943). In *Walling*, the Court found that the flow of interstate commerce did not necessarily cease once goods were delivered to a wholesaler located in the state of destination:

> " 'It is clear that the purpose of the [Fair Labor Standards Act] was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce. There is no indication ... that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act. As in the case of an agency ... if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce.'

"*Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567-68 (1943). Finding that the wholly intrastate delivery of various paper products (including newsprint) was subject to Congressional regulation, the Court held that the

products remained 'in commerce' because they had been ordered pursuant to preexisting contracts or understandings with customers. Under such circumstances,

> " 'a break in their physical continuity of transit is not controlling. If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. The fact that respondent may treat the goods as stock in trade or the circumstance that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate.'

"317 U.S. at 568-69. *Walling* stands for the proposition that temporary stops in an interstate journey of merchandise to a predetermined destination do not necessarily interrupt the flow of commerce. See, e.g., *Stewart-Jordan Distrib. Co. v. Tobin*, 210 F.2d 427 (5th Cir.), cert. denied, 347 U.S. 1013 (1954).

"This Court's decision of September 22[, 2000] is consistent with the principles described in *Walling*. The newspapers distributed by Stewart and Hyde were subject to preexisting orders in the form of subscriptions. Those subscriptions required that Stewart and Hyde deliver news, features, news magazines, and commercial advertising inserts (all of the 'preprints, supplements, and inserts' designated for delivery pursuant to

their agreements) in a timely manner on the day of publication to the subscriber. Much of the news content, many of the photographs, and virtually all of the news magazines, special features, and commercial advertising inserts were published and prepared in their entirety outside of Alabama for distribution to the subscriber. As the United States Supreme Court found in *Walling*, the preexisting order — the subscription — by the ultimate subscriber 'indicates where it is intended that the interstate movement should terminate.' *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568-69 (1943). To find that the purpose for the production of such news and advertising was for it to be delivered to The News would be to 'allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce.' 317 U.S. at 567-68.

"The conclusion reached in this case concerning the intrastate distribution of news, features, and commercial advertising moving in interstate commerce is consistent with the conclusions reached by other courts.* In 1998, for example, the United States District Court for the Middle District of Georgia found that district managers of a newspaper 'engaged in' interstate commerce when they delivered newspapers to readers. The court held that, because the newspapers contained supplements and other material printed outside of Georgia, the district managers became part of a 'practical continuity of movement' of interstate commerce when they delivered the newspapers to readers within Georgia. *Webb v. Athens Newspapers, Inc.*, 999 F. Supp. 1464 (M.D. Ga. 1998). In 1972, the United States District Court for the Central District of California found that a news dealer was an inseparable part of the flow of interstate commerce because the newspaper he distrib-

uted contained news, feature material, comics, and other information that had moved in interstate commerce. *Dahl v. Hearst Corp.*, [No. 72-2107, December 13, 1972] (C.D. Cal. 1972) [not published in F. Supp.]; see also *Wirtz v. Universal Adver. Serv.*, 258 F. Supp. 542 (N.D. Okla. 1966) (similar holding with respect to the distribution of advertising circulars, handbills, and similar printed matter).

"In summary, Stewart and Hyde have not pointed to any misapprehension of fact or law on the part of this Court. The opinion of September 22 is not at odds with *Sisters of the Visitation*, because this Court properly found that Stewart and Hyde were integral and inseparable parts of the flow of interstate commerce.

"*The decisions of the United States Supreme Court in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), and that of the [United States Court of Appeals for the] Third Circuit in *Evening News Publishing Co. v. Allied Newspaper Carriers of New Jersey*, 263 F.2d 715 (3d Cir. 1959), cert. denied, 360 U.S. 929 (1959), are hardly the relics that Stewart and Hyde would have this Court believe."

APPENDIX C

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

CASE NO. CV99-4313

HUGH STEWART,
Plaintiff,
vs.
THE BIRMINGHAM NEWS COMPANY,
Defendant.

ORDER

THIS CAUSE was heard on the Defendant, The Birmingham News Company's ("The News"), Motion to Stay Civil Action and to Compel Arbitration. Counsel for all parties were present and presented arguments in support of and in opposition to said Motion.

The Plaintiff, Hugh Stewart, entered into an independent news dealer agreement with the Defendant which provides in pertinent part that the Defendant would sell to the Plaintiff its complete newspaper, including, reprints, supplements and inserts and that the Plaintiff would make regular and prompt deliveries of the complete newspaper to the ultimate consumer in a designated area. The agreement contains a provision providing for arbitration of all claims and controversies arising out of the contract and it is undisputed that both parties voluntarily entered into the agreement with knowledge that the arbitration provision was contained therein. The Plaintiff contends that the agreement was executed in Alabama between an Alabama corporation and a resident citizen of Alabama and that the complete

transaction, including, the sale of the complete newspaper to the Plaintiff by the Defendant occurred in Alabama and the delivery by the Plaintiff to the ultimate consumer was to a designated area, also, entirely within Alabama. The Plaintiff, therefore, contends that the arbitration provision is inapplicable because this entire transaction does not involve interstate commerce.

On the other hand, The News contends that the products necessary to prepare the newspaper, including, the paper, ink, rubber bands and plastic containers all came from outside the State of Alabama and therefore involved interstate commerce. The News further contends that the newspaper itself contains reprints, supplements and inserts that were prepared outside the State of Alabama and shipped to The News to be included in its newspaper to be delivered to the ultimate consumer. The News further contends that the newspaper, reprints, supplements and inserts included advertisements for companies outside the State of Alabama which are designed to encourage the ultimate consumer to purchase their products which were manufactured and distributed in interstate commerce. The News contends that these factors evidence a transaction affecting interstate commerce and therefore the arbitration provision is applicable.

In determining whether the Federal Arbitration Act applies to a transaction within the state a two-pronged test is applied. That standard is that the FAA applies to a contract if:

1. The contract was one involving interstate commerce; and

2. The contract contained an arbitration agreement voluntarily entered into by the parties. *Ex parte Ala-*

bama Oxygen Company, 433 So.2d 1158 (Ala. 1983). In this case it is undisputed that there was an arbitration clause in the contract and therefore the only question is whether the contract was one involving interstate commerce. The requirement of the FAA that an arbitration agreement "involved commerce" has been construed very broadly so that the slightest *nexus* of the agreement with interstate commerce will bring the agreement within the ambit of the FAA. *Ex Parte Coster and Head (Atrium) Limited*, 486 So.2d 1272 (Ala. 1986). In *Hurst v. Tony Moore Imports, Inc.*, 699 So.2d 1249 (Ala. 1997) our Court in a plurality decision, explained that the United States Supreme Court precedent indicates that even an intrastate transaction "involves" interstate commerce if it has virtually any tangible effect on the generation of goods or services for interstate markets and their distribution to the consumer. *Delta Construction Corporation v. Gooden*, 714 So.2d 1975 (Ala. 1988). The Court finds that the sale and distribution of newspapers that include reprints, inserts and supplements, as in this case, substantially affects interstate commerce in that one of its expressed purposes, in addition to providing current news, is to provide a means for advertisers to solicit consumers to purchase their goods and services not only in Alabama but in other states. The Court finds that this purpose and the means to accomplish it distinguishes the newspaper business from the janitorial service business as described in *United States v. American Building Maintenance Industries*, 422 US 271, 91 S.Ct. 2150 (1975).

It is, therefore, ORDERED, ADJUDGED and DECREED that the Defendant's Motion to Stay Civil Action and Compel Arbitration is GRANTED. This action is stayed and all claims asserted in the Complaint

against the Defendant, The Birmingham News Company, shall be submitted to arbitration pursuant to the terms of the arbitration agreement entered into between the parties.

DONE and ORDERED this the 27th day of October, 1999.

G. WILLIAM NOBLE
CIRCUIT JUDGE

cc: all parties

APPENDIX D

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

CASE NO. *CV99-4314*

KAMERON HYDE,
Plaintiff,
vs.
THE BIRMINGHAM NEWS COMPANY,
Defendant.

ORDER

THIS CAUSE was heard on the Defendant, The Birmingham News Company's ("The News"), Motion to Stay Civil Action and to Compel Arbitration. Counsel for all parties were present and presented arguments in support of and in opposition to said Motion.

For the reasons set forth in this Court's Order in *Hugh Stewart v. Birmingham News Company*, CV99-4313 the Motion to Stay and to Compel Arbitration is due to be granted.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this action is stayed and all claims against the Defendant, The Birmingham News Company, shall be submitted to arbitration pursuant to the arbitration agreement between the parties.

DONE and ORDERED this the 27th day of October, 1999.

G. WILLIAM NOBLE
CIRCUIT JUDGE

cc: all parties

APPENDIX E

REL: 11/3/2000

SUPREME COURT OF ALABAMA
OCTOBER TERM, 2000-2001

1990700
The Birmingham News Company
v.
Sherry Horn

Appeal from Jefferson Circuit Court
(CV-99-4243)

JOHNSTONE, Justice.

This appeal involves an identical agreement and presents the same issue addressed by this Court in *Ex parte Stewart*, [Ms. 1990418, September 22, 2000] ___ So. 2d ___ (Ala. 2000). Therefore, on the authority of *Ex parte Stewart*, we reverse the trial court's order denying the motion to compel arbitration filed by The Birmingham News Company, and remand this cause for entry of an order granting the motion to compel arbitration.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Maddox, Houston, Brown, and England, JJ., concur.

Hooper, C.J., concurs in the result.

Cook and Lyons, JJ., dissent.

See, J., recuses himself.

COOK, Justice (dissenting).

I respectfully dissent, for the same reasons expressed by Justice Lyons in *Ex parte Stewart*, [Ms.1990418, September 22, 2000] ___ So. 2d ___ (Ala. 2000) (Lyons, J., dissenting).

Lyons, J., concurs.

APPENDIX F

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

SHERRY HORN, an individual,
Plaintiff,
vs.
THE BIRMINGHAM NEWS COMPANY,
Defendant.

CASE NO. *CV-99-4243*

ORDER

This matter came before the Court on defendant's Motion to Stay Civil Action and Compel Arbitration, which was opposed by Plaintiff. On November 2, 1999, the parties presented arguments in support of and in opposition to said Motion.

Plaintiff, a Birmingham resident, entered into an Independent News Dealer Agreement with The Birmingham News Company (the News") in February 1998. The Independent News Dealer Agreement ("Agreement") executed by the parties contains a provision providing for arbitration of all claims and controversies arising out of the contract. The Plaintiff contends that the Federal Arbitration Act ("FAA") does not apply because the Agreement is not a transaction involving interstate commerce. 9 U.S.C. § 2.

The Agreement provides that Plaintiff would purchase from Defendant newspapers for resale to residential and business customers in her specific territory located in the Birmingham area. Pursuant to said

contract, Plaintiff agreed to make regular and prompt deliveries of the newspaper to her customers. This lawsuit was filed after the News failed to renew Plaintiff's Agreement. The Plaintiff alleges that the News is guilty of fraud in representing to her that the Agreement would be renewed so long as she performed satisfactorily. In addition to the alleging fraud in the inducement, Plaintiff's Complaint contains allegation of civil conspiracy, breach of contract, violation of Alabama's Antitrust Act, unjust enrichment, tortious interference with business relationship and deceptive trade practices.

In considering the issues presented in this case, the Court has been mindful of the Alabama Supreme Court's description of the burdens of the respective parties regarding a motion to compel arbitration. The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that that contract involves a transaction affecting interstate commerce. Once a party presents such evidence, the burden shifts to the party opposing arbitration to present some evidence indicating that there is no arbitration agreement subject to specific enforcement under the FAA. *See Ex Parte Caver*, [ms. 1981070], 1999 WL 667294 (Ala. Aug. 27, 1999).

In support of its motion to compel arbitration, the Defendant submitted an affidavit of its Circulation Director. The gist of this affidavit is that certain components of the newspaper, including inserts, news content, ink, advertisements and product samples, come from outside the State of Alabama; that the Birmingham News is sold outside Alabama; and that certain dealers purchase from Defendant rubber bands and polyethylene bags which are manufactured by companies outside Alabama.

The Plaintiff argues that Defendant's affidavit proves only that the News engages in interstate commerce with others. The Plaintiff contends that she was never engaged in interstate commerce with regard to her Agreement because the flow of interstate commerce stopped at the News, which is incorporated in Alabama and has its principal place of business in Birmingham, Alabama. *See Hurst v. Tony Moore Imports, Inc.*, 699 So.2d 1249, 1253-1255 (Ala. 1997), *citing United States v. American Building Maintenance Industries*, 422 U.S. 217 (1975). The Plaintiff purchased a complete newspaper from Defendant; she did not purchase ink, news content, inserts or product samples. The negotiations regarding the Agreement took place in Birmingham. The newspapers were printed and assembled in Birmingham and were distributed by Plaintiff only to customers within a defined territory in the Birmingham area. Plaintiff purchased rubber bands and polyethylene bags from the News and not from any company outside the State of Alabama.

The Court agrees with Plaintiff that the transaction at issue — the Agreement – is not within the flow of interstate commerce. The Agreement is a purely intrastate transaction. Bur the question remains as to whether this intrastate transaction and a "substantial effect on the generation of goods or services for interstate markets and their distribution to the consumer." *See Southern United Fire Ins. Co. v. Knight*, [ms. 1971559], 1999 WL 181567 (Ala. April 2, 1999). As the News correctly asserted, even the slightest nexus of the Agreement with interstate commerce will bring the Agreement within the scope of the FAA. *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265 (1995). Yet nothing in the Agreement nor in the affidavit submitted

by Defendant shows a nexus, even a slight one, between the contract at issue and interstate commerce. The Agreement itself makes no reference to any interstate matters. *See Garikes, Wilson v. Episcopal Foundation*, 614 So.2d 447, 449 (Ala. 1993). This Court refuses to presume any substantial effect on interstate commerce absent any proof. *Jim Burke Automotive, Inc. v. Beavers*, 674 So.2d 1260, 1261 (Ala. 1995). The evidence submitted by the News pertains only to a flow of interstate commerce from sources outside Alabama to the News. Plaintiff has effectively rebutted this evidence with proof that the flow of commerce did not extend to her Agreement. It is the opinion of this Court that Defendant did not meet its burden of producing evidence that the Agreement between the parties involved interstate commerce.

It is, therefore, ORDERED, ADJUDGED and DECREED that the Defendant's Motion to Stay Civil Action and Compel Arbitration is DENIED.

DONE and ENTERED this the 23rd day of November, 1999.

WILLIAM A. JACKSON,
Circuit Judge

APPENDIX G

IN THE SUPREME COURT OF ALABAMA
February 23, 2001

1990700

The Birmingham News Company v. Sherry Horn (Jefferson Cir.Ct.No.: CV-99-4243)

ORDER

IT IS ORDERED that the application for rehearing filed in the above cause on November 17, 2000, be, and the same is hereby, overruled. NO OPINION.

JOHNSTONE, J. - Moore, C.J., and Houston, Brown, Harwood, Woodall, and Stuart, JJ., concur; Lyons, J., dissents.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 23rd day of Feb., 2001.

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX H

9 USC Sec. 1

"Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

APPENDIX I

9 USC Sec. 2

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(2)

No. 00-1378

Supreme Court, U.S.
FILED
APR 4 2001
CLERK

In The

Supreme Court of the United States

HUGH STEWART, KAMERON HYDE, and SHERRY HORN,

Petitioners,

v.

THE BIRMINGHAM NEWS COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Alabama Supreme Court

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES P. PEWITT
Counsel of Record
GILBERT E. JOHNSTON, JR.

JOHNSTON BARTON PROCTOR & POWELL LLP
2900 AmSouth/Harbert Plaza
1901 6th Avenue North
Birmingham, Alabama 35203
(205) 458-9400

PETER C. GOULD
BARRY N. STEINER

SABIN BERMANT & GOULD
Four Times Square
New York, New York 10036
(212) 381-7000

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Alabama Supreme Court erred in finding that commercial contracts to purchase, distribute, and solicit subscriptions for newspapers in Alabama – newspapers which include national news stories and photographs supplied by news services located outside of Alabama; special features, supplements, news magazines, and commercial advertising inserts prepared and printed outside of Alabama; and promotional samples of products made outside of Alabama, and which newspapers are printed on paper purchased outside of Alabama with ink purchased outside of Alabama – involve interstate commerce and are therefore subject to the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1-16.

RULE 29.6 STATEMENT

All of the outstanding stock of Respondent, The Birmingham News Company ("The News"), is owned by Advanced Publications, Inc., a New York corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

THE FACTS OF THE CASE 1

THE ARGUMENTS ON APPEAL 6

THE DECISION OF THE ALABAMA SUPREME COURT 7

REASONS WHY THE WRIT SHOULD BE DENIED .. 11

I. The Alabama Supreme Court Did Not Err When It Found that the Distribution of Newspapers Was an Inseparable Part of the Flow of the Interstate Commerce Involved 12

A. The Alabama Supreme Court Correctly Concluded that *American Building Maintenance* Is Distinguishable from this Case 17

B. The Alabama Supreme Court Correctly Concluded that the Flow Was Not Interrupted by Changes in the Product 19

II. Even if the Distribution of Newspapers Was Not an Inseparable Part of the Flow of Interstate Commerce, It Nevertheless Had a "Substantial Effect" on Interstate Commerce 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

A & P v. FTC, 557 F.2d 971 (2nd Cir. 1977), *cert. denied*, 440 U.S. 69 (1979) 19

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 6, 7, 8, 11

Circuit City Stores, Inc. v. Adams, 69 U.S.L.W. 4195 (2001) 7

Dahl v. The Hurst Corp., 1972 U.S. Dist. LEXIS 10715 (C.D. Cal. 1972) 17

Dean Milk Co. v. FTC, 395 F.2d 696 (7th Cir. 1968) 19

Evening News Publishing Co. v. Allied Newspaper Carriers of New Jersey, 263 F.2d 715 (3rd Cir. 1959), *cert. denied*, 360 U.S. 929 (1959).....8, 9, 10, 20

Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir. 1965), *cert. denied*, 382 U.S. 959 (1965)..... 19

Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974) 6, 18

Hardrives Co., Inc. v. East Coast Asphalt Corp., 329 F.2d 868 (5th Cir. 1964), *cert. denied*, 379 U.S. 903 (1964) 16

Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc., 452 U.S. 264 (1981) 22, 24

Katzenbach v. McClung, 379 U.S. 294 (1964) ... 22, 23, 24

Lorain Journal v. United States, 342 U.S. 143 (1951) 8, 9, 11, 20

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 23

Perez v. United States, 402 U.S. 146 (1971) 22, 24

TABLE OF AUTHORITIES – Continued

Page

Reno v. Condon, 528 U.S. 141 (2000) 20

Schroepfer v. A.S. Abell Co., 138 F.2d 111 (4th Cir. 1943) 20, 25

Schultz v. Circulation Sales, Inc., 301 F. Supp. 937 (E.D. Mich. 1969) 17, 25

Southland Corp. v. Keating, 465 U.S. 1 (1984) 4, 11

Stewart-Jordan Distrib. Co. v. Tobin, 210 F.2d 427 (5th Cir. 1954), *cert. denied*, 347 U.S. 1013 (1954) 16

Swift and Co. v. United States, 196 U.S. 375 (1905) 14

Tefco Finance Co. v. Green, No. 1991402 (Ala. March 16, 2001) 23

United States v. American Building Maintenance Industries, 422 U.S. 271 (1975) 7, 17, 18

United States v. Lopez, 514 U.S. 549 (1995) ..... *passim*

United States v. Morrison, 529 U.S. 598 (2000) 11, 21, 22, 23, 24

Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943) 14, 15, 16

Webb v. Athens Newspapers, Inc., 999 F. Supp. 1464 (M.D. Ga. 1998) 16

Wickard v. Filburn, 317 U.S. 111 (1942) 6, 22, 23, 24

Wirtz v. Universal Advertising Service, 258 F. Supp. 542 (N.D. Okla. 1966) 17

STATUTES

9 U.S.C. § 2 4

9 U.S.C. §§ 1-16 1

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. §§ 1 and 2 9

18 U.S.C. § 922(q)(1)(A) 12

29 U.S.C. § 1257(a) 1

ALA. CODE § 8-1-41(3) (1993) 4

Alabama Antitrust Act 4

U.S. CONST. art. I, § 8, cl. 3 1

U.S. CONST. art. I, § 8, cl. 18 1

OTHER AUTHORITIES

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-5 (3d ed. 2000) 13

JURISDICTION

While The News denies that certiorari would be appropriate in this case, it agrees that the case raises issues arising under the Constitution of the United States. 29 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The News agrees that this case involves the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and the FAA, 9 U.S.C. §§ 1-16. The issues raised in this case may also involve the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, which provides that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" all of the powers vested by the Constitution in the federal government.

THE FACTS OF THE CASE

This case arises out of an agreement by each of the Petitioners, Hugh Stewart ("Stewart"), Kameron Hyde ("Hyde"), and Sherry Horn ("Horn"), to serve as dealers and distributors of the largest daily newspaper in the state of Alabama, *The Birmingham News*. Stewart, Hyde, and Horn entered into written contracts with The News, the terms of which are substantially identical. Each agreement provides that the dealer will purchase a sufficient number of newspapers from The News to supply all home subscribers and all customers at newsstands, stores, news racks, or other places where newspapers

may be sold within an area of primary responsibility for a period of one year. Each agreement also requires that the dealer "make regular and prompt deliveries on the date of publication of complete newspapers intact, *including preprints, supplements, and inserts designated by [The News].*" (Emphasis added.)

The "preprints, supplements, and inserts" to which each agreement refers include national news magazines. One such magazine, entitled *Parade*, is a weekly publication featuring stories on a range of topics, including health, beauty, entertainment, and other items of personal interest. *Parade* is published outside of Alabama. Issues of the magazines are prepared, printed, and shipped into Alabama, as well as other states, for distribution along with daily newspapers like *The Birmingham News*. Another such magazine, called *React*, was targeted to teenagers. It was also published outside of Alabama and prepared, printed, and shipped into Alabama, as well as other states, for distribution along with daily newspapers.[1]

The "preprints, supplements, and inserts" also include a substantial quantity of commercial advertising inserts for national retail chains such as Sears, Home Depot, and others. These are separate, multipage inserts, some of which are bound or folded like a magazine, featuring a variety of products for sale. The advertising inserts are also prepared and printed by companies located outside of Alabama and shipped into the state for distribution.

---

[1] *React* is no longer published.

The "preprints, supplements, and inserts" also include special features such as the Sunday comics. The Sunday comics are prepared in their entirety by a separate company located outside of Alabama.

In addition to being required to deliver the newspaper, the preprints, the supplements, and the inserts described above, Stewart, Hyde, and Horn were each required by their agreements to maintain reasonable levels of circulation in their areas of primary responsibility and to use their best efforts to maintain that circulation and to solicit new customers and subscribers. Maintaining circulation is described in each agreement as being "of the essence."

In 1998, the business relationships between Stewart, Hyde, and The News deteriorated. The News became dissatisfied with Stewart's and Hyde's performance. It ultimately terminated Stewart's agreement and elected not to renew Hyde's agreement.

In December 1998, The News notified Horn that it would not renew her agreement in its then-present format when it expired early in 1999. Although The News offered her a new agreement, Horn refused to sign, contending that The News had no right to change any of the terms of her current agreement. She contended that she had purchased the right to distribute *The Birmingham News* from a previous dealer in her area and that, despite the provision in her agreement with The News that limited its term to one year, The News was obligated to renew it without change as long as she was performing satisfactorily.

On July 27, 1999, Horn filed a civil action against The News in the Circuit Court for Jefferson County, Alabama, alleging that, by exercising its contractual right not to renew the agreement, The News had breached it, committed fraud, conspired to commit fraud, violated the Alabama Antitrust Act, had been unjustly enriched, had tortiously interfered with Horn's business, and was guilty of deceptive trade practices. Three days later, Stewart and Hyde filed virtually identical actions against The News.

The News filed a motion to stay the civil action and to compel arbitration in each case, based on an arbitration provision contained in each agreement. Although under Alabama law predispute arbitration agreements are generally unenforceable, *see* ALA. CODE § 8-1-41(3) (1993), a party can nevertheless enforce such an agreement if it can show that the transaction at issue involves interstate commerce and that Alabama's law would therefore be preempted by the FAA. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984). The FAA provides in pertinent part that "a written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2.

With its motions, The News submitted to the trial court an affidavit from its Circulation Director, Toby Pearson, in which he described the extensive interstate activity involved in the performance of the agreements at issue in this case. In addition to describing the origin of the news supplements, news magazines, and commercial advertising inserts, Mr. Pearson described how The News

obtains a significant portion of national news content and photographs from outside the State under agreements with news services such as the Associated Press, Universal Press, Knight Ridder, Tribune, and King Features. He described how The News buys the paper on which *The Birmingham News* is printed from companies in Tennessee and Mississippi and how it buys its ink from a company in New Jersey. He explained that many of the advertisements that appear in the pages of *The Birmingham News* are designed by advertising agencies located outside of Alabama and that, from time to time, The News also includes advertisers' product samples with the newspapers that it sells to dealers such as Stewart, Hyde, and Horn and that they then distribute to subscribers. Those samples are typically shipped to The News from advertisers who are located outside of Alabama.[2]

Different trial court judges in Jefferson County heard The News' motions. The Stewart and Hyde cases were assigned to, and consolidated before, one judge, and the Horn case was assigned to another. The trial court in the Stewart and Hyde cases granted the motions to compel arbitration. The trial court in the Horn case denied the motion, finding an insufficient connection to interstate commerce. The parties then sought review of all three cases by the Alabama Supreme Court.

---

[2] Mr. Pearson also stated in his affidavit that *The Birmingham News* is sold in several other states.

THE ARGUMENTS ON APPEAL

On appeal to the Alabama Supreme Court, The News made three arguments: First, it argued that the transactions at issue involved "commerce in fact" as that term was used by this Court in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). Like the petitioner in *Allied-Bruce*, The News used materials and supplies from outside the State of Alabama to perform each agreement, and its business is multistate in nature. Second, The News argued that the national news content, features, supplements, news magazines, and advertising inserts were in the "flow" of interstate commerce, with the dealer acting as an inseparable and integral part of that flow. *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974) (defining "in commerce" as related to the "flow" and defining the "flow" to include "the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer"). Third, The News argued that the transactions at issue affected interstate commerce directly and substantially, especially when considered in the aggregate. *See United States v. Lopez*, 514 U.S. 549 (1995); *Wickard v. Filburn*, 317 U.S. 111 (1942). The News argued that the performance of news dealer agreements necessarily affects the purchase by The News of paper, ink, and other materials; the purchase and sale of goods advertised in the newspaper; the purchase of advertising space in *The Birmingham News*; and, ultimately, The News' very ability to gather and disseminate national and international news.

Stewart, Hyde, and Horn argued, just as they have argued here, that the contracts at issue involve no more

than the local delivery of newspapers. Citing *United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975), they argued that they purchased complete newspapers from The News, and not the component parts, and that any flow of interstate commerce ceased when the various component parts of the newspaper were delivered to The News. They also argued that, to the extent their activity had any effect on interstate commerce, that effect was not "substantial." *See United States v. Lopez*, 514 U.S. at 558-59.

THE DECISION OF THE ALABAMA SUPREME COURT

The Alabama Supreme Court found that the agreements at issue did involve interstate commerce. It found that the FAA applied and that the motion to compel arbitration in each case should have been granted.

The Alabama Supreme Court's analysis began with this Court's holding in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). In *Allied-Bruce*, this Court interpreted the scope of Section 2, the FAA's coverage provision. Relying on the background and purpose of the FAA and the words used in the statute, this Court held that the phrase "a contract evidencing a transaction involving commerce" should be read broadly, extending the FAA's reach "to the limits of Congress' commerce clause power." 513 U.S. 268.[3] According to this Court, the

[3] Within the last few weeks, this Court repeated, and relied on, the interpretation of Section 2 set out in *Allied-Bruce*. *See Circuit City Stores, Inc. v. Adams*, 69 U.S.L.W. 4195 (2001).

word "involving," as used in Section 2, should be read as the functional equivalent of "affecting." It covers not only those activities that are "in the flow" of interstate commerce, but also those activities that "affect" interstate commerce. 513 U.S. at 273-74.

The Alabama Supreme Court then reviewed two cases that had previously analyzed the relationship between interstate commerce and the local distribution of newspapers, *Lorain Journal v. United States*, 342 U.S. 143 (1951), and *Evening News Publishing Co. v. Allied Newspaper Carriers of New Jersey*, 263 F.2d 715 (3rd Cir. 1959), *cert. denied*, 360 U.S. 929 (1959). In *Lorain Journal*, this Court analyzed the interstate activity of a daily newspaper located in Lorain, Ohio:

> While but 165 out of the Journal's daily circulation of over 20,000 copies are sent out of Ohio, it publishes not only Lorain news but substantial quantities of state, national and international news. It pays substantial sums for such news and for feature material shipped to it from various parts of the United States and the rest of the world. It carries a substantial quantity of national advertising sent to it from throughout the United States. Shipments and payments incidental to the above matters, as well as the publisher's purchases of paper and ink, involve many transactions in interstate or foreign commerce.

342 U.S. at 151. Concluding that the newspaper was engaged in interstate commerce, the Court wrote as follows:

> There can be little doubt today that the immediate dissemination of news gathered from

> throughout the nation or the world by agencies specially organized for that purpose is a part of interstate commerce. The same is true of national advertising originating throughout the nation and offering products for sale on a national scale. The local dissemination of such news and advertising requires continuous interstate transmission of materials and payments, to say nothing of the interstate commerce involved in the sale and delivery of products sold.
>
> * * *
>
> ***The distribution within Lorain of the news and advertisements transmitted to Lorain in interstate commerce for the sole purpose of immediate and profitable reproduction and distribution to the reading public is an inseparable part of the flow of the interstate commerce involved.***

342 U.S. at 151-52 (emphasis added).

In *Evening News*, the U.S. Court of Appeals for the Third Circuit found that news dealers – dealers like Stewart, Hyde, and Horn – were an "inseparable part of the flow of the interstate commerce involved." In that case, a group of news dealers tried to force a newspaper to eliminate the home delivery of some of its newspapers by newsboys. The newspaper filed suit against the dealers, alleging that their actions violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). The trial court agreed and entered an injunction against the dealers. On appeal, the dealers argued that the newspaper had failed to show an unlawful conspiracy to restrain interstate commerce. They emphasized the intrastate nature of their relationship with the newspaper and their delivery of newspapers only within their home state. The Court of

Appeals disagreed with the dealers and affirmed the trial court, holding as follows:

> The truncated argument advanced would have us forget completely that interstate commerce is an inseparable, indispensable part of this . . . newspaper. The News does furnish neighborhood, city, county and state news to its readers. And by far the major portion of its sales are in New Jersey. But an essential element of its being (perhaps considering its territory and the present state of this world of ours its most essential element) is the obtaining, dissemination and interpretation of national and world-wide news. Intrastate advertising is necessary to the economic life of the paper and necessary to its readers. Interstate advertising affects the paper and its readers to a lesser degree but affect them it does appreciably. *To place that news and advertising in the hands of New Jersey people requires, as the United States Supreme Court said in [Lorain], "continuous interstate transmission of materials and payments to say nothing of the interstate commerce involved in the sale and delivery of product sold." The end result, the distribution of the News, as a complete newspaper containing those news items and advertisements, to its reading public in Newark or any other New Jersey area is, as the Court held in [Lorain] " . . . an inseparable part of the flow of the interstate commerce involved."*

263 F.2d at 717 (emphasis added). The court found that "the home delivery of the News is an integral part of the interstate operation." 263 F.2d at 717.

The Alabama Supreme Court agreed with the Court of Appeals' application of *Lorain Journal* and found that the cases of Stewart, Hyde, and Horn were virtually indistinguishable. It concluded that the FAA therefore applied. Because the court found that Stewart, Hyde, and Horn were themselves engaged "in" commerce, or were integral parts of the "flow" of interstate commerce, the court did not find it necessary to decide whether the activity of dealers and distributors like Stewart, Hyde, and Horn "affect," substantially or otherwise, interstate commerce.

REASONS WHY THE WRIT SHOULD BE DENIED

The sole issue argued before the Alabama Supreme Court was whether the activity of Petitioners – activity that is purely commercial – would be within the authority of Congress to regulate and therefore subject to the FAA. Petitioners did not argue that *Allied-Bruce* was wrongly decided or, for that matter, that the FAA should not apply in state courts. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984). Petitioners focused only on the scope of Congress' authority to regulate commercial activity. That subject has been well-defined by longstanding precedent of this Court. Even a cursory review of this Court's cases, including *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), shows that the activity of news dealers such as Stewart, Hyde, and Horn is well within the authority of Congress to regulate pursuant to the Commerce Clause.

The petition does not raise any new or important issues. The petition does not demonstrate any substantive

conflict between the decision of the Alabama Supreme Court and the decision of a U.S. Court of Appeals or another state court of last resort. For these and the other reasons described in greater detail below, this petition is due to be denied.

I. The Alabama Supreme Court Did Not Err When It Found that the Distribution of Newspapers Was an Inseparable Part of the Flow of the Interstate Commerce Involved.

Much of the Petitioners' argument in this case is based upon their reading of *Lopez*. For reasons that will be discussed below in section II, *Lopez* does not change the outcome in this case. *Lopez* does, however, provide a useful framework for analyzing whether the activity at issue here would be within the authority of Congress to regulate.

In *Lopez*, this Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), was an unconstitutional attempt by Congress to exercise its power to regulate activities in and affecting interstate commerce. The act prohibited an individual from knowingly possessing a firearm within one thousand feet of the grounds of a school. In its opinion, the Court explained that it had previously identified "three broad categories" of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of channels of interstate commerce. Second, "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from

intrastate activities." 514 U.S. at 557. Finally, Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce. *Id.*

The Alabama Supreme Court's decision now before the Court fits within the second *Lopez* category – the broad general category of cases that recognize the authority of Congress to regulate persons or things that are in some sense participating "in" interstate commerce. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-5, at 829 (3d ed. 2000) ("Although the Court might more comfortably have described it as a separate category, *Lopez* located the regulation of 'persons or things "in" interstate commerce,' or 'participating in' such commerce, in the instrumentalities branch of the Court's Commerce Clause doctrine."). The substantial effects test need not apply to cases like this one, where the actual persons and things involved are themselves within the flow of commerce. Such persons and things, by definition, substantially affect – because they are components of – interstate commerce. *See id.* § 5-5, at 827.

The Alabama Supreme Court is certainly not the first court to equate or define "in commerce" as related to the "flow" of commerce. In 1905, Justice Holmes wrote as follows:

> [C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do

> so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, *the current thus existing is a current of commerce among the States*, and the purchase of the cattle is a part and incident of such commerce.

Swift and Co. v. United States, 196 U.S. 375, 399 (1905) (emphasis added). In 1943, the Court again discussed the movement of goods in a current of interstate commerce and the authority of Congress to regulate it, as well as those who participate in it. *See Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943). In *Walling*, the Court addressed the reach of the Fair Labor Standards Act. It determined that the flow of interstate commerce, and therefore the reach of that Act, did not necessarily cease once goods were delivered to a wholesaler located in the state of destination:

> It is clear that the purpose of the [Fair Labor Standards Act] was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce. There is no indication . . . that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer "in commerce" within the meaning of the Act. As in the case of an agency . . . if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to

> their final destinations, they remain "in commerce" until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce.

317 U.S. at 567-68. Finding that the wholly intrastate delivery of various paper products (including newsprint) was subject to Congressional regulation, the Court held that the products remained "in commerce" because they had been ordered pursuant to pre-existing contracts or understandings with customers. Under such circumstances,

> [a] break in their physical continuity of transit is not controlling. If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. The fact that respondent may treat the goods as stock and trade or the circumstance that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate.

317 U.S. at 568-69. *Walling* stands for the proposition that temporary stops in an interstate journey of merchandise

to a predetermined destination do not necessarily interrupt the flow of commerce. *See Hardrives Co., Inc. v. East Coast Asphalt Corp.*, 329 F.2d 868 (5th Cir. 1964), *cert. denied*, 379 U.S. 903 (1964); *Stewart-Jordan Distrib. Co. v. Tobin*, 210 F.2d 427 (5th Cir. 1954), *cert. denied*, 347 U.S. 1013 (1954).

The Alabama Supreme Court's decision is consistent with the principles described in *Walling*. The newspapers distributed by Stewart, Hyde, and Horn were subject to pre-existing orders in the form of subscriptions. Those subscriptions required that Stewart, Hyde, and Horn deliver news, features, news magazines, and commercial advertising inserts (all of the "preprints, supplements, and inserts" designated for delivery pursuant to their agreements) in a timely manner on the day of publication to the subscriber. Much of the news content, many of the photographs, and virtually all of the news magazines, special features, and commercial advertising inserts were published and prepared in their entirety outside of Alabama for distribution, without change, to the subscriber. As this Court held in *Walling*, the pre-existing order – the subscription – by the ultimate subscriber "indicates where it is intended that the interstate movement should terminate." *Walling*, 317 U.S. at 568-69. To hold that the purpose for the production of such news and advertising was for it to be delivered to The News would be to "allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce." 317 U.S. at 567-68.

The Alabama Supreme Court's decision is also consistent with the conclusions reached by many other courts. *See Webb v. Athens Newspapers, Inc.*, 999 F. Supp. 1464 (M.D. Ga. 1998) (holding that district managers of a

newspaper in Georgia were "engaged in" interstate commerce when they delivered newspapers to readers in Georgia because the newspapers contained supplements and other material printed outside of Georgia); *Dahl v. The Hurst Corp.*, 1972 U.S. Dist. LEXIS 10715 (C.D. Cal. 1972) (holding that a news dealer was an inseparable part of the flow of interstate commerce because the newspaper he distributed contained news, feature material, comics, and other information that had moved in interstate commerce); *see also Wirtz v. Universal Advertising Service*, 258 F. Supp. 542 (N.D. Okla. 1966) (holding that the distribution of advertising circulars, handbills, and similar printed matter was in commerce); *Schultz v. Circulation Sales, Inc.*, 301 F. Supp. 937 (E.D. Mich. 1969) (focusing on the solicitation of newspaper subscriptions – "the horse which pulls the cart of advertising" – the court found that "[i]n the totality of the flow of news and advertising and its dissemination locally, clearly those who solicit subscriptions are 'so directly and vitally related to the functioning [of a newspaper's interstate commerce] as to be a part of it' ").

A. The Alabama Supreme Court Correctly Concluded that *American Building Maintenance* Is Distinguishable from this Case.

Stewart, Hyde, and Horn relied primarily on *United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975), to argue that any flow of interstate commerce ceased at The News. The Alabama Supreme Court, however, correctly concluded that the facts of *American Building Maintenance* were distinguishable from those of this case.

In *American Building Maintenance*, this Court concluded that a janitorial services company, which cleaned the office of a company that was engaged in interstate commerce, was not itself "engaged in commerce" for purposes of Section 7 of the Clayton Act. The activities of the janitorial services company were different from the activities of commercial distributors such as Stewart, Hyde, and Horn. The janitorial services company did not purchase products for the express purpose of distributing them to consumers pursuant to pre-existing orders or understandings. Stewart, Hyde, and Horn, on the other hand, were indispensable links in the chain of distribution of out-of-state news, features, news magazines, and advertising to the ultimate subscriber. If Stewart, Hyde, and Horn breached their agreements, the entire purpose for producing such news, features, and advertising would be thwarted.[4] The News could continue to function if its office were not clean; The News' ability to function and to conduct interstate commerce would be fundamentally and substantially impaired, however, if its newspapers were not delivered to subscribers or if dealers failed to

---

[4] For that reason, the facts of this case are also distinguishable from those of *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974). *Gulf Oil* dealt with the manufacture and distribution intrastate of asphaltic concrete, a product made by combining and heating various ingredients. The market for asphaltic concrete was entirely local, and the ingredients were all obtained intrastate. There was no contention in that case that the local market in asphaltic concrete was an integral part of the interstate market in other component commodities or products. *See* 419 U.S. at 196 ("[n]or does [Copp] contend that the local market in asphaltic concrete is an integral part of the interstate market in other component commodities or products").

use their best efforts to maintain and grow circulation in their respective areas.

B. The Alabama Supreme Court Correctly Concluded that the Flow Was Not Interrupted by Changes in the Product.

Stewart, Hyde, and Horn also argued that the flow of interstate commerce ceased at The News because they purchased complete newspapers, not component parts, from The News.[5] They argued that the items moving in interstate commerce changed form, apparently just as the ingredients in sausage making change form as the sausage is made. The news magazines, advertising inserts, and features did not change form. They were not subjected to a manufacturing process that changed their character in any appreciable way. *See A & P v. FTC*, 557 F.2d 971 (2nd Cir. 1977), *rev'd on other grounds*, 440 U.S. 69 (1979); *Dean Milk Co. v. FTC*, 395 F.2d 696 (7th Cir. 1968); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674 (5th Cir. 1965), *cert. denied*, 382 U.S. 959 (1965). Moreover, Petitioners' argument ignored the fundamental nature and purpose of a daily metropolitan newspaper containing national news content and

---

[5] In an attempt to support this argument, Stewart, Hyde, and Horn state in their petition that they purchased "assembled" newspapers from The News. There was no evidence in the record, however, about who actually "assembled" the newspapers. Although Stewart, Hyde, and Horn did state in affidavits that they purchased "complete" newspapers, none of them addressed whether they themselves had assembled or, in the parlance of the business, "stuffed" the newspapers.

commercial advertising and their roles as commercial distributors. As was explained in *Lorain Journal* and *Evening News*, an essential element of a newspaper's enterprise is the obtaining and dissemination of national and worldwide news. The product here is not merely some combination of paper and ink (although the source of those materials is important). The product is information. *See Reno v. Condon*, 528 U.S. 141 (2000) (describing motor vehicle information as an article of commerce). A substantial amount of that information flows through Stewart, Hyde, and Horn in an unaltered condition, in the form of news stories and photographs from out-of-state entities such as the Associated Press.

The only case cited by Petitioners that even remotely supports their position is the 1943 decision of the U.S. Court of Appeals for the Fourth Circuit in *Schroepfer v. A.S. Abell Co.*, 138 F.2d 111 (4th Cir. 1943). In that case, the Court of Appeals held that "rack men," individuals whose sole responsibility was the delivery of newspapers to retail locations, were not engaged in interstate commerce. *Schroepfer*, however, is not in conflict with the decision of the Alabama Supreme Court for several reasons. First, *Schroepfer* was decided before this Court decided *Lorain Journal*. *Schroepfer*'s continuing validity is, therefore, questionable. Second, *Schroepfer* is factually distinguishable from this case. *Schroepfer* did not involve news dealers, individuals who, like Petitioners, are responsible not only for the delivery of newspapers to retail locations, but also for home delivery, maintaining circulation, and soliciting subscriptions ("pre-existing orders") for the newspaper. *Schroepfer* also did not involve the delivery of news magazines, commercial advertising inserts, and other features prepared in their

entirety outside of the state and distributed, without change, to the ultimate subscriber.

In summary, the Alabama Supreme Court's opinion treads within the boundaries of this Court's Commerce Clause cases. It fits within the second of the three general categories of Commerce Clause cases that this Court recognized in *Lopez*. The Alabama Supreme Court applied a correct, longstanding, and well-reasoned rule of law to the facts of this case. Stewart, Hyde, and Horn are merely unhappy with the result.

II. Even if the Distribution of Newspapers Was Not an Inseparable Part of the Flow of Interstate Commerce, It Nevertheless Had a "Substantial Effect" on Interstate Commerce.

Stewart, Hyde, and Horn now argue that the Alabama Supreme Court applied the wrong analysis when it decided this case. They contend that the Alabama Supreme Court should have determined whether the activity at issue in this case fits within *Lopez's* third category – those cases upholding the authority of Congress to regulate commercial activity that in the aggregate substantially affects interstate commerce. They believe that, in view of this Court's decisions in *Lopez* and *Morrison*, the performance of their contracts should not be deemed to have substantially affected interstate commerce.

Stewart, Hyde, and Horn read far too much into this Court's decisions in *Lopez* and *Morrison*. As explained above, *Lopez* dealt with the constitutionality of a federal criminal statute, the Gun-Free School Zones Act, that by its terms had nothing to do with commerce or any sort of economic enterprise. *Morrison* dealt with the constitutionality of another federal criminal statute, the Violence

Against Women Act of 1994, that also had nothing to do with commerce or any sort of economic enterprise.

A fair reading of *Lopez* shows that it did not change the level of influence on interstate commerce that commercial activity must exert before it becomes subject to federal regulation. In a concurring opinion in *Lopez*, Justice Kennedy wrote that the case did not alter the Court's "practical conception of commercial regulation" and that Congress may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy." *Lopez*, 514 U.S. at 573-74 (Kennedy, J., concurring). When this Court "canvassed and clarified [its] case law governing this third category of Commerce Clause regulation," *see Morrison*, 529 U.S. at 609, it wrote as follows:

> We have upheld a wide variety of congressional acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining; [*Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc.*, 452 U.S. 264 (1981)] intrastate extortionate credit transactions, [*Perez v. United States*, 402 U.S. 146 (1971)] restaurants utilizing substantial interstate supplies, [*Katzenbach v. McClung*, 379 U.S. 294 (1964)], and production and consumption of home-grown wheat, *Wickard v. Filburn*, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942). These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

514 U.S. at 559-60. The Court cited as examples of commercial activity having a "substantial" effect on interstate commerce some of the most far-reaching cases in the history of the Commerce Clause: *Katzenbach v. McClung*, for example, which held that a restaurant's sale of food to local patrons – an intrastate transaction between an Alabama resident and an Alabama business – substantially affected interstate commerce and could be regulated because the restaurant obtained meat from an Alabama company that, in turn, obtained the meat from outside of Alabama; and *Wickard v. Filburn*, which held that the activities of a farmer who raised wheat for his own personal consumption substantially affected interstate commerce. In *Wickard* the Court had found that home-grown wheat would have a "substantial" influence on price and market conditions and in that sense would compete with wheat in commerce. 317 U.S. 111, 128 (1942). Nothing in *Lopez* called the outcomes of these cases into question. *See* 514 U.S. at 573 (Kennedy, J., concurring) ("[t]hese and like authorities are within the fair ambit of the Court's practical conception of commercial regulation and are not called in question by our decision today").[6]

Like *Lopez*, *Morrison* also did not change the level of influence on interstate commerce that commercial activity

---

[6] The Court also did not question the aggregation or cumulative effects feature of the substantial effects test, at least as it applied to purely economic activity. *See Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Following the decisions of this Court, Alabama law also views economic activity in the aggregate to determine whether it affects interstate commerce. *Tefco Finance Co. v. Green*, No. 1991402 (Ala. March 16, 2001).

must exert before it becomes subject to federal regulation. This Court's decision in *Morrison* did not question the broad authority of Congress to regulate purely commercial activity. Following the commercial versus non-commercial distinction drawn by the Court in *Lopez*, the Court again cited with approval cases such as *Hodel*, *Perez*, *McClung*, and *Wickard* – the "pattern of analysis" described in *Lopez* which consistently sustained the authority of Congress to regulate economic activities that, although local in nature, have a substantial aggregate effect on interstate commerce. 529 U.S. at 610. Quoting *Lopez*, the Court again concluded that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." 529 U.S. at 610.

The present case involves the kind of commercial activity that the Court recognized in *Lopez* and *Morrison* as well within the authority of Congress to regulate. In fact, the aggregate or cumulative effect of the commercial activity at issue here is so obvious as to be "visible to the naked eye." *See Lopez*, 514 U.S. at 563.

Stewart, Hyde, and Horn try very hard to characterize their agreements as involving nothing more than the local delivery of newspapers. The news dealer agreement at issue in this case, however, requires more than the delivery of newspapers. The News must supply the papers, and the dealer must purchase them. That basic purchase and sale agreement has undeniable economic effects. The purchase and sale of newspapers affects the purchase by The News of the paper, ink, and other materials necessary to prepare the newspaper. The News obtains those materials from outside of Alabama. *See*

Schroepfer v. A.S. Abell Co., 138 F.2d 111, 114 (4th. Cir. 1943) (in this case cited by Petitioners, the court wrote that "[w]hen the news printed or the material used in the papers is transported across state lines interstate commerce is necessarily 'affected' by anything that affects the publication and sale of papers"). The purchase and sale of newspapers also has an effect on the ability of The News to sell its services to advertisers located outside of Alabama. The circulation of a newspaper bears a direct relationship to its ability to generate advertising sales. *See Schultz v. Circulation Sales, Inc.*, 301 F. Supp. 937 (E.D. Mich. 1969). Finally, the distribution of the advertisements themselves, as well as product samples, can reasonably be expected to affect the purchase and sale of goods in interstate commerce. Indeed, the very purpose for distributing advertisements is to affect the purchase and sale of goods in interstate commerce.

CONCLUSION

The decision of the Alabama Supreme Court should not be surprising or controversial. The case does not involve the kind of activity at issue in *Lopez* or *Morrison* – non-commercial, criminal conduct taking place wholly within a state, the regulation of which would raise serious questions about the balance of federal and state power. To the contrary, the activity at issue here – purely commercial conduct within the "flow" of interstate commerce – fits easily within the power of Congress to regulate under the Commerce Clause. Even if the commercial activity at issue here was not properly regarded as being "in" commerce or in the "flow" of commerce, it still had

an undeniable and "substantial effect" on commerce. For that reason alone, the result reached by the Alabama Supreme Court is correct and should be left undisturbed. For all of the reasons described in this brief, the petition should be denied.

Respectfully submitted,

James P. Pewitt
Counsel of Record
Gilbert E. Johnston, Jr.

Johnston Barton Proctor
& Powell llp
2900 AmSouth/Harbert Plaza
1901 6th Avenue North
Birmingham, Alabama 35203
(205) 458-9400

Peter C. Gould
Barry N. Steiner

Sabin Bermant & Gould
Four Times Square
New York, New York 10036
(212) 381-7000

Counsel for Respondent